Supreme Court, U.S.
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In The

Supreme Court of the United States

HUGO ARMENDARIZ-MONTOYA,

Petitioner,

v.

RONALD SMITH, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 440(d) of the AntiTerrorism and Effective Death Penalty Act of 1996 ("AEDPA") removed the ability of long-time lawful permanent residents to seek a waiver of deportation under Title 8 of the United States Code, § 1182(c). In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that aliens convicted prior to the enactment of § 440(d) remained eligible for a discretionary waiver of deportation provided they were eligible for such relief at the time of their *plea*, under the law then in effect. The questions presented are:

1. Whether aliens who were convicted by *jury trial* prior to the enactment of the AEDPA, for pre-enactment offenses, remain eligible for a discretionary waiver of deportation per the Court's holding in *St. Cyr*.

2. If not, whether equal protection is violated where the restriction applies to deportable, but not excludable aliens.

The case also raises the following antecedent question:

3. Whether *deportation* proceedings commence, for purposes of determining the retroactive nature of § 440(d)'s temporal reach, upon service of the Order to Show Cause on the alien, or upon filing with the Immigration Court, for which the courts of appeals are in conflict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hugo Armendariz-Montoya, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 291 F.3d 1116. The opinion of the district court (App., *infra*, 44a-45a) which incorporated, in part, the order granting petitioner habeas relief, is unreported. The recommendation of the magistrate judge (App. *infra*, 15a-43a) is unreported. The decisions of the immigration judge (App., *infra*, 48a), and Board of Immigration Appeals (App., *infra*, 46a-47a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on May 30, 2002. A timely petition for rehearing was denied on November 26, 2002 (App., *infra*, 54a-55a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 50a-53a) are pertinent provisions of Section 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Section 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1229b(a), and 1252(g) of Title 8, as in effect beginning April 1, 1997; Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276 (enacted Apr. 24, 1996) ("AEDPA"); and Section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996) ("IIRIRA").

STATEMENT

A. Statutory Background

This case presents important, recurring questions concerning the application of a new statute governing the deportation of legal permanent residents for criminal convictions that pre-dated its enactment. Prior to 1996, legal permanent residents who accrued at seven years residence in the United States and committed a deportable act, were statutorily eligible to apply for a waiver of deportation, provided that they were not convicted of an "aggravated felony" offense and did not serve at least five years imprisonment, regardless of whether the conviction was obtained by plea or jury trial. In 1996, Congress added a new restriction on the statutory eligibility to apply for a waiver by barring relief for all aliens convicted of controlled substance violations or "aggravated felony" offenses. Thus, lawful permanent residents who were once eligible for relief under the prior law were subjected to mandatory deportation under the new law.

Although Congress has broad, plenary constitutional powers over the regulation of aliens in the United States, including restrictions on the availability of relief from deportation for events which pre-date the change in law, Congress must express such an intention in an unambiguous manner. If Congress fails to clearly manifest its intention, the new restrictions cannot apply retroactively to impose new disabilities or legal consequences to past considerations as a result of the law's change. A new restriction which further upsets past conduct, settled expectations, reasonable reliance, and fair notice is impermissibly retroactive. Decisions or considerations based upon a particular state of law or then-existing information are impermissibly frustrated when a new legal consequence is attached at a time after the decision-making process has been completed.

B. Proceedings Below

1. Petitioner, Hugo Armendariz-Montoya, is a thirty-three year old citizen of Mexico who first "entered the United States without inspection when he was three years old." App. 2a. Mr. Armendariz became a lawful permanent resident on May 23, 1978, at the age of eight. Mr. Armendariz "has resided in the United States since his entry," for more than thirty years. App. 2a. All of Mr. Armendariz's family – including his U.S. citizen mother, lawful permanent resident father, U.S. citizen child, and three U.S. citizen siblings – reside in the United States.

2. On September 15, 1995, Mr. Armendariz was convicted of the offense of Unlawful Possession of Cocaine for Sale; Mr. Armendariz was "sentenced to five years, eight months imprisonment." App. 2a. While incarcerated, Mr. Armendariz successfully completed several rehabilitation programs and was released early from criminal custody in September, 1999. On September 22, 1995, the U.S. Immigration & Naturalization Service ("INS") lodged a detainer against Mr. Armendariz.

3. On April 5, 1996 the INS issued an Order to Show Cause ("OSC") in *deportation*[1] proceedings, alleging his deportability for having been convicted of a qualifying aggravated felony or controlled substance violation. *See* 8 U.S.C. §§ 1251(a)(2)(A)(iii), (B)(i) (1994). App. 3a. On April 22, 1996, the INS served the OSC upon Mr. Armendariz, explaining the nature of deportation proceedings, his rights and obligations, legal authority for the proceeding, his right to counsel, the factual allegations, grounds of

[1] An immigration proceeding instituted after April 1, 1997 is classified as "removal" and has varying procedures, rights, requirements, judicial review rules, and relief. *See* 8 U.S.C. § 1229a (Supp. IV 1998).

deportability, and the consequences of his failure to appear at his deportation proceeding. App. at 3a.

4. Both at the time Mr. Armendariz was convicted, and when he was served with the OSC, he was eligible for a § 212(c) waiver. The INS filed the OSC with the Immigration Court eight months later, on December 19, 1996. App. 3a. In the interim period, on April 24, 1996, Section 440(d) of the AEDPA was enacted, negating § 212(c) relief for aliens deportable for having committed a qualifying offense. During the course of his deportation proceeding, Mr. Armendariz sought relief pursuant to § 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). His requests were denied. App. 3a-4a.

5. In April 1997, an immigration judge ("IJ") determined a § 212(c) waiver was statutorily unavailable due to the then-recent amendments of Section 440(d) of the AEDPA, and issued an order of deportation. The Board of Immigration Appeals ("BIA") affirmed the IJ's decision, citing AEDPA Section 440(d)'s retroactive effect. App. 4a. Mr. Armendariz timely "filed a petition for review with [the court of appeals]." App. 4a. In February 2000, the court of appeals dismissed the petition for lack of jurisdiction, citing *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999); *see also* IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626 to 627 (stripping jurisdiction over claims on direct review for aliens deportable for certain grounds). App. 4a.

6. In March 2000, Mr. Armendariz sought habeas corpus relief in the district court, challenging the BIA's legal ruling that he was statutorily ineligible to apply for Section 212(c). The magistrate judge recommended the district court grant the petition based upon a finding that the service of the OSC *in conjunction* with lodging of the detainer, was sufficient to render the proceedings "pending" (or "commenced") for "retroactivity" purposes of determining whether the AEDPA's and IIRIRA's substantive changes to the law of discretionary waivers under § 212(c) apply, and per the court of appeals' prior holding

in *Magana-Pizano, infra*, that § 212(c) remained available to those whose proceedings commenced prior to the AEDPA. App. 15a-43a

7. The magistrate judge noted that it "need not decide whether service of the OSC alone was sufficient to commence deportation proceedings" because a detainer was lodged in conjunction with the service of the OSC. App. 24a-28a. Also, the magistrate judge found the reasoning offered by the various courts of appeal to be persuasive. App. 26a-28a. *See Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999); *Alanis-Bustamante v. Reno*, 201 F.3d 1301 (11th Cir. 2000). The magistrate judge further noted that every other district court to consider the precise issue had ruled in favor of Mr. Armendariz's claim. App 27a. The magistrate judge declined to reach Mr. Armendariz's assertion that § 440(d) violated equal protection. App. 28a-29a. The district court adopted – in part – the magistrate's recommendations. App. 44a-45a. The district court ordered the remand and reopening of Mr. Armendariz's case for consideration of a § 212(c) hearing. *Ibid.* The INS perfected a timely appeal to the court of appeals. App. at 34.

8. The court of appeals reversed. App. at 4a-14a. *First*, the court concluded that the proceeding "commenced" upon the *filing* of the OSC – not only for purposes of the proceeding itself – but also for retroactivity purposes under § 440(d) and the continuing availability of § 212(c) relief, rather than upon *service* of the same. The court held, "[b]ecause the INS did not file the OSC until December 1996, his proceedings were not pending at the time of AEDPA's enactment." App. 9a. *Secondly*, in the panel's view, aliens convicted by *jury trial* rather than by *plea* were ineligible to seek § 212(c) relief because "application of § 440(d) does not result in any retroactive effect" insofar as, "aliens who elected a jury trial cannot plausibly claim that they would have acted any differently [if they] had known about § 440(d)." App. 9a-10a (*citing LaGuerre v.*

Reno, 164 F.3d 1035 (7th Cir. 1998) (holding that habeas corpus review did not survive § 440(d)).

(i) In holding that proceedings "commenced" with the OSC's filing, the court "relied upon INS regulations to this effect" and purportedly based its decision upon Circuit precedent. *Cortez-Felipe v. INS*, 245 F.3d 1054 (9th Cir. 2001); App. 5a. In rejecting Mr. Armendariz's assertions that *Cortez* was distinguishable on the facts and law, the court stated "*Cortez* does not allow it, and states in sweeping terms that deportation proceedings commence with the filing of the OSC." App. 7a. While the court acknowledged the "material identical circumstances" present in the First Circuit's case, and the distinctions drawn by the First Circuit in both *Wallace v. Reno*, *supra* at 281, and *Costa v. INS,* 233 F.3d 31 (1st Cir. 2000), between the "commencement" of proceedings and "commencement" for retroactivity purposes, the court "decline[d] to follow it" insofar as it found it "unpersuasive." App. 6a-8a. The panel found that the issue was constrained by the court's earlier decision, in that "*Cortez* accorded great weight to the relevant INS regulations, which do not allow for a different outcome depending upon whether a particular section of AEDPA or IIRIRA is involved." App. 7a. The court did not address Armendariz's contentions that this Court's holding in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), governed the First Circuit's decision in *Costa,* and the court's prior decision in *Cortez*, regarding 8 U.S.C. § 1252(g)'s limitation that no court shall have jurisdiction to hear any cause or claim by an alien, "from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." *See e.g.*, 8 U.S.C. § 1252(g) (Supp. IV 1998). The court also rejected Armendariz's claim that the lodging of the warrant of detainer in *conjunction* with the service of the OSC, rendered proceedings "pending" (or "commenced") for retroactivity purposes in determining AEDPA § 440(d)'s temporal reach. In declining to follow the Eleventh

Circuit's decision in *Alains-Bustamante v. Reno*, *supra*, on materially similar facts, the court noted, "*Cortez* does not allow for such a rule." App. 8a-9a. The relevant INS regulations make the filing of the OSC, not the lodging of a detainer, the critical event." *Ibid.*

(ii) While observing that Congress did not prescribe AEDPA's temporal reach, the court found that § 440(d) applies to Armendariz because it did not have a retroactive effect. In the panel's view, "aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about § 440(d)." App. 10a. In reaching that conclusion, the court purported to apply (App. 13a) the two-step analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), for determining whether a federal statute applies to pre-enactment conduct. App. 9a. The court stated, "[i]t would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they [faced mandatory deportation]." App. 10a (*quoting LaGuerre v. Reno*, 164 F.3d at 1041 (7th Cir. 1998).

(iii) Finally, the court, in rejecting Armendariz's claims that equal protection is violated by providing a waiver to excludable, rather than deportable aliens, noted that "[we] rejected an identical challenge in *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), *overruled on other grounds, United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc)." App. 12a. In *Estrada-Torres*, the court found that "despite § 440(d)'s plain language, it applies equally to exclusion and deportation proceedings." *Ibid.* Here, the court also noted the inter-circuit tension in that, "[w]hile our sister circuits have uniformly rejected an identical challenge, they have employed different reasoning . . . [they] have adopted the

BIA's interpretation that § 440(d) only applies to deportation, and not to exclusion proceedings." App. 13a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided As To When Proceedings "Commence" For Purposes Of Retroactivity Under AEDPA § 440(d)

A. The Case Squarely Presents The Conflict

Insofar as the court of appeals' decision, on important issues such as the administration of the immigration laws and the retroactive impact of new legislation, is in conflict with the decisions at least two sister courts of appeal involving materially similar circumstances, this Court's supervisory role ought be invoked. *Compare Armendariz-Montoya v. Sonchik, supra,* and *Asad v. Reno*, 242 F.3d 702 (6th Cir. 2001) with *Wallace v. Reno, supra*, and *Alainis-Bustamante v. Reno, supra*. This genuine, legal conflict exists despite materially similar circumstances, which has been expressly acknowledged by the court ("We decline to follow the First Circuit's distinction between AEDPA and IIRIRA in determining when deportation proceedings commence.") App. 7a; ("[w]e are also unpersuaded by *Costa* that the time deportation proceedings commence should turn on whether a particular section of AEDPA or IIRIRA is involved.") App. 8a.; ("Armendariz urges us to adopt the logic of the Eleventh Circuit, and hold that deportation proceedings commence with the service of the OSC if a detainer is contemporaneously lodged. *Cortez* does not allow for such a rule.") App. 8a. The need, therefore, to bring uniformity of the decisions among the federal courts of appeals which have addressed the issue of "pending" (or "commenced") proceedings regarding the retroactive effect of AEDPA's § 440(d), is paramount. Because the underlying questions and proper administration of the immigration laws are issues of practical significance affecting thousands of individuals, the direct conflict which now

exists among the First, Sixth, Ninth, and Eleventh Circuits offers a further compelling reason of national importance requiring this Court's supervisory jurisdiction to be invoked.

First, the court of appeals misconstrued the holding and reasoning of the Circuit's decision in *Cortez-Felipe*. The court held that "[*Cortez*] tells us that deportation proceedings commence with the filing of the OSC with the Immigration Court." *Cortez*, in fact, does not stand for such a broad-sweeping, generalized proposition. Instead, *Cortez* concerns the ability of an alien to "commence" proceedings on his own accord or through judicial action. At issue in *Cortez* was the prohibition of a court's ability to review the discretionary decision of the Attorney General with respect to three concrete actions "to commence proceedings, adjudicate cases, or execute removal orders" which was first visited by this Court. *See Reno v. American-Arab Anti-Discrimination Comm.*, *supra* at 481-82; *see also* 8 U.S.C. § 1252(g). *Cortez* did not analyze when proceedings are "pending" for retroactivity purposes, but rather a court's ability to interfere with the prosecutorial decisions of the Attorney General to affirmatively "commence" proceedings. *Id.* at 945. This Court specifically stressed the limited scope of Section 1252(g), and its aim to protect premature review of "discretionary determinations." *Id.* at 943-944 (holding that the "zipper" clause does not cover the entire universe of deportation claims.) In this light, *Cortez* concerned principles of "equitable estoppel" and the ability of a court to "order" the Attorney General to "commence" a particular type of proceeding. *Cortez,* 245 F.3d at 1057 ("Petitioner urges us to exercise our equitable powers . . . we have not authority to grant the requested relief.") Because the court of appeals misconstrued this Court's precedent in its understanding of the correct application of Section 1252(g) as well as the reasoning of *Cortez,* it incorrectly decided when proceedings are "pending" for purposes of retroactivity in direct conflict with the

First and Eleventh Circuits. *Cortez*, 245 F.3d at 1057 ("[t]he Attorney General has discretion regarding when and whether to initiate deportation proceedings."); *Accord Reno v. AADC*, *supra*, at 481-83. The panel misconstrued this Court's precedent regarding Section 1252(g).

In contrast, the First Circuit clearly identified, recognized, and distinguished the subtle difference between these apparently similar issues in *Costa v. INS*, 233 F.3d 36. The court of appeals' decision failed to properly distinguish the reasoning in *Cortez* which was forged from the First Circuit's earlier decision in *Costa*. *Cortez*, 245 F.3d at 1056-57. In turn, the court failed to recognize the First Circuit's reasoning in *Costa* was guided by this Court's own decision in *AADC*, and § 1252(g). *Costa,* 233 F.3d at 36-37. *Cortez* is distinguishable both on the facts and the law. The panel's decision on this issue is in irreconcilable conflict with the First and Eleventh Circuits.

B. The Issue Presented By The Conflict Is Recurring And Of Great Practical Importance Regarding The Immigration Laws

The amount of litigation which has spawned as a result of the enactment of AEDPA § 440(d) is a recurring problem affecting the national judiciary. Nearly seven years after the passage of the AEDPA, countless legal challenges, writs of habeas corpus, and petitions for review and certiorari have been filed. Because the immigration laws affect foreign and national policies and are continually called upon for review, there exists a recurring problem which has continuing future consequences. Evidence of this effect is told by the history of litigation formed in the wake of Section 440(d), itself. *See INS v. St. Cyr*, 533 U.S. 289, 290 (2001) (Court recognizing "[t]he importance of [the] questions warranted our grant of certiorari.") Although Section 440(d) has since been abolished, its effects continue to linger. Moreover, the general principles giving

rise to litigation in the first instance are not likely to change, as Congress has plenary power over immigration matters. *INS v. Chadha*, 462 U.S. 919, 941-942 (1983) (Congress must choose "a constitutionally permissible means of implementing" that power). Hence, so long as Congress fails to clearly state the parameters in exercising this right, this Court's supervision is required. Given the current political environment and the real possibility of Congressional action affecting a change in future immigration law, the potential for additional controversy and confusion is manifest. A review of the recent history of protracted litigation, lends support that only the prompt action of this Court can resolve the questions presented. *See Brooks v. Ashcroft*, 283 F.3d 1268, 1275 n.7 ("We would like to comment on the plethora of cases that have inundated our Circuit and our sister Circuits regarding this issue, and the ease in which this burdensome and protracted litigation could have been avoided with a simple declaration by Congress regarding the retroactivity of legislation when it is passed. A one line sentence could have avoided many of these problems, and would certainly have spared the *resources* of the federal court system.") (emphasis added). Unless this Court takes immediate action, the current trend of litigation is likely to continue, burdening this judiciary's limited resources.

Moreover, the importance of the issues is underscored as illustrated by their frequent recurrence in the district courts. The issue has arisen repeatedly and is the subject of pervasive confusion among the lower courts. As the magistrate judge noted, every other district court to consider the precise issue has ruled in favor of Mr. Armendariz's claim. App. at 92 (citing *Attwood v. Reno*, 111 F.Supp.2d 57 (D. Mass. 2000) (holding that petitioner's deportation proceedings commenced on April 18, 1996 when the INS issued the OSC even though it was not served until June 6, 1996) *affirmed on other grounds Attwood v. Ashcroft*, 260 F.3d 1 (1st Cir. 2001); *Sciglitano*

v. Holmes, 2000 WL 675696 (E.D.Pa. 2000) (holding that the service of the OSC commenced deportation proceedings); *Mercado-Amador v. Reno*, 47 F. Supp. 2d 1219, 1224 (D.Or. 1999) (holding that proceedings commenced upon OSC's issuance); *Canela v. United States Dept. of Justice*, 64 F. Supp. 2d 456, 458 (E.D.Pa. 1999) (same); *Dunbar v. INS*, 64 F. Supp. 2d 47, 52 (D. Conn. 1999) (same); *Bury v. Reno*, 101 F. Supp. 2d 296 (E.D.Pa 2000) (same); *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000) (same). Of the four Circuit courts of appeals which have addressed the "commencement" issue, the Sixth and Ninth are divided with the First and Eleventh. Hence, this Court's supervisory role is further required.

II. The Decision Below Reflects The Widespread Confusion And Uncertainty As To This Court's Retroactivity Analysis Under *Langraf* And Other Precedents, Which This Court Alone Can Dispel

Importantly, this Court ought to grant certiorari because the court of appeals has decided a pure question of federal law that has not been, but should be, settled by this Court. That is, whether this Court's retroactivity analysis and holding in *St. Cyr* should be logically extended to aliens who were convicted by *jury trial* rather than by plea. Moreover, the decision below has been decided in a way that conflicts with the relevant decisions of this Court regarding the *Landgraf* principles of retroactivity. *INS v. St. Cyr*, *supra*; *Reno v. AADC*, *supra*. The court of appeals has misconstrued and misapplied this Court's applicable retroactivity precedents by limiting, and requiring, a degree of fostered reliance. *Armendariz-Montoya v. Sonchik*, *supra*, at 1121 (". . . aliens who elected a jury trial cannot plausibly claim that they would have acted any differently.") As the court of appeals' decision is an incorrect application of this Court's precedential decisions and is in tension with the same, certiorari ought to be granted.

Here, the court of appeals incorrectly concluded that § 440(d) of the AEDPA did not have a genuine, impermissible retroactive effect if an alien was convicted by "jury trial," rather than by plea. The court of appeals' purported retroactivity analysis failed to recognize that aliens – when facing a criminal proceeding – make strategic choices and decisions whether to risk going to trial or to accept a plea agreement based upon the direct impact those decisions will have upon their immigration status. The court of appeals ignored the fact that aliens often base decisions, concerning the preservation of their immigration status, upon the information which is then-available. Because the court of appeals' reasoning was unwarrantedly narrow, it misses the fact that if aliens had been aware that § 440(d) was forthcoming and of its *potential impact* upon their immigration statuses, at the time of their decision-making process, they would have elected to accept a plea agreement or other alternative disposition which preserved their immigration statuses, rather than risk going to trial mistakenly relying on the availability of § 212(c) in the event they had *lost* at trial. *See e.g., INS v. St. Cyr*, 533 U.S. at 322-24 (2001).

The court's flawed retroactivity analysis, moreover, failed to recognize this Court's reasoning that § 440(d) impaired a party's rights when he acted (i.e., by making a strategic decision based upon information known to him in deciding whether to go to trial or accept a plea), increased a party's liability for past conduct (i.e., by removing the availability of § 212(c) relief based upon a past criminal conviction), and imposed new duties with respect to transactions already completed (i.e., removing the availability of § 212(c) relief based upon the strategic decision-making process during his criminal proceeding). Clearly, as this Court has noted in *St.Cyr*, Section 440(d) increased the liability of Mr. Armendariz's criminal conduct and decision-making processes, and impaired his rights to seek a § 212(c) waiver based upon his decision to go to trial. *Id.*

at 323-35. The court's retroactivity analysis falls short of traditionally accepted jurisprudence, and ignores the reasoning and guidance of this Court's decisions in both *Landgraf* and *St. Cyr*. Finally, the decision failed to properly identify Section 440(d)'s retroactive effect and failed to adhere to the framework and approach developed by the circuit's prior precedential decisions. *Magana-Pizano v. INS*, at 613 (noting that "AEDPA § 440(d)'s bar of discretionary relief . . . should not apply to aliens whose deportation proceedings were pending when AEDPA became law").

This case presents an important and recurring statutory and constitutional problem which this Court must address. Moreover, because the court's decision is an erroneous interpretation of this Court's retroactivity principles, it is likely to have serious judicial consequences in the long run. The erosion and misinterpretation of this Court's *Landgraf* analysis, by the various courts of appeal, regarding when a statute functions impermissibly retroactive is of utmost importance in all areas of the law. The various courts of appeal which have spoken on the issue have misinterpreted this Court's *Landgraf* reasoning to hold that "reliance" is a strict requirement. *See Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) ("we [have] held the retroactivity analysis must include an examination of reliance in a guilty plea situation."); *See Brooks v. Ashcroft*, 283 F.3d at 1274 ("[b]ecause [petitioner] did not so choose to rely upon the agreed upon terms of a plea, he is not similarly situated to individuals who plead guilty. There are not the same concerns of *quid pro quo* benefit for an exchange"); *Asad v. Reno*, 242 F.3d at 705 ("Asad did not legitimately rely on the possibility that section 212(c) relief would be afforded him"); *Chambers v. Reno*, 307 F.3d 384 (4th Cir. 2002) ("[petitioner] does not have a reliance interest comparable to that which was at the heart of *St. Cyr* . . . [who] made his decisions in the context of a *quid pro quo* relationship"); *Rankine v. Reno*, 2003 WL 179792,

*5 (2nd Cir. (N.Y.)) ("none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief."). Thus, because the lower courts of appeal have ignored the broad range of factors used in determining retroactivity, they have impermissibly construed and eroded this Court's *Landgraf* principles, for which this Court must provide clarification. Because the doctrine of judicial restraint mandates that patience, in the judicial resolution of conflicts, often yields the most desirous results, the issues before this Court are ripe for certiorari review insofar as the various courts of appeal which have had occasion to review it have already spoken.

Finally, because this Court addressed only the narrow question presented in *St. Cyr* regarding convictions by plea, rather than by jury, the development of the law in this area also mandates review. This case is yet another piece of the mosaic in that it is the companion to *St. Cyr*.

III. The Decision Below is Incorrect

A. The Circuit Courts Have Disagreed As To When Proceedings "Commence" For Purposes Of Retroactivity.

Cortez-Felipe v. INS, 245 F.3d at 1055, upon which the court relied, is distinguishable on its facts and the law. In *Cortez*, an alien anticipating IIRIRA's April 1, 1997 amendments, which included more stringent provisions for discretionary relief, set up an appointment with her attorney for the issuance of an OSC by the INS. In March, 1997, an OSC was issued, but never filed. Instead, the INS issued a "Notice to Appear" to initiate "removal" proceedings; which was filed in April, 1997. Hence, that case involved the propriety of two different regimes – "removal" or "deportation" – rather than "retroactivity" concerns for a single proceeding. *See Cortez*, 245 F.3d at 1055 ("Petitioner presents 'an abstract legal question concerning the

effect, if any, of a served but unfiled OSC'. . . .") (*quoting Costa, supra,* at 34).

Cortez argued "equitable estoppel" against the INS and that deportation proceedings had commenced, *first*. The court of appeals dismissed Cortez's case holding that it was without power or authority to review the *prosecutorial functions* of the Attorney General to *initiate* proceedings. *See Cortez-Felipe v. INS*, 245 F.3d at 1056-57 (*citing Yao v. INS*, 2 F.3d 317, 319 (9th Cir. 1993) ("As a matter of statutory authority and administrative discretion, the INS is free to decide not to commence deportation proceedings. . . . "); *Cabasug v. INS*, 847 F.2d 1321, 1324 (9th Cir. 1988) ("The Attorney General retains discretion at the stage of deciding to initiate a deportation proceeding.") The Circuit had previously recognized that *Cortez's* request was essentially an attempt to "order" the INS to *initiate* proceedings so that he could take advantage of pre-IIRIRA rules. As the Circuit noted, it was without lawful authority or power to review the discretionary decision of the Attorney General to *initiate* proceedings. *Cortez*, 245 F.3d at 1057. In this vein, this Court has held that no court shall have jurisdiction to hear any cause or claim by an alien, "from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." *See Reno v. American-Arab Anti-Discrimination Committee, supra*, at 483 (holding that the "zipper clause" contained in 8 U.S.C. § 1252(g) does not cover the entire universe of deportation claims); *United States v. Camacho-Bordes*, 94 F.3d 1168, 1174 (8th Cir. 1996); *see also* 8 U.S.C. § 1252(g) (Supp. IV 1998). Hence, the reasoning behind the decision in *Cortez* is based upon this Court's interpretation of § 1252(g) to preclude judicial review of the Attorney General's decision to "commence" proceedings. *See e.g., AADC*, 525 U.S. at 483-84. The court's decision incorrectly conflated the two issues of "commencement" and "pending" for retroactivity purposes.

The First Circuit, however, properly identified and recognized the precise distinction between the issue presented in *Cortez-Felipe*, and the issue presented here. The facts in *Costa v. INS*, 233 F.3d at 34, are similar, if not identical, to *Cortez-Felipe*. In that case, an alien, accompanied by his attorney, presented himself at a INS office for the issuance of an OSC. The OSC was *never issued*, and instead a Notice to Appear was served and filed. *Costa v. INS,* 233 F.3d at 32. Costa challenged his removal proceeding, citing *Wallace v. Reno, supra*, and arguing that he had been placed into deportation proceedings. The First Circuit stated, in pertinent part,

> The *Wallace* case did not primarily involve IIRIRA, but rather, a *complementary set of changes of the immigration laws effected by the Antiterrorism and Effective Death Penalty Act* of 1996 (AEDPA). . . . Faced with a close question as to whether the enlarged ban on waivers could constitutionally be applied to a person who, prior to AEDPA's effective date, had pled guilty to a felony which at the time of the plea did not render the perpetrator ineligible for suspension of deportation, *we concluded that Congress did not intend the ban on discretionary waivers to operate in so draconian a fashion. Wallace*, 194 F.3d at 286-87. In that context, we rejected the INS's contention that 8 C.F.R. § 3.14(a) controlled and held that, for purposes of his habeas case, Wallace had been placed in deportation proceedings . . . when the INS served him with an OSC. . . . *Wallace* is inapposite here. There, we were concerned that *once criminal proceedings against an alien had begun*, the existing rules applicable to suspension of deportation likely would *command his attention and foster reliance during his decisionmaking in connection* with the pending criminal charges. *Id.* Given the likelihood that *such rules might have played a significant role in the alien's strategic choices when defending*

> *against the pre-AEDPA criminal charges (e.g., deciding whether to plead guilty or to stand trial), changing them after the game had started raised a special set of fairness concerns.*

Costa v. INS, supra, at 34-35 (emphasis added).

The First Circuit went on to note that the facts presented in *Costa*, almost identical to those in *Cortez-Felipe*, mandated that the proceeding be considered as "commenced" upon the *filing* of an OSC. *Id.* The First Circuit recognized four important distinctions, present both in *Costa* and *Cortez*. The Circuit noted *Costa* dealt with: (1) pure-IIRIRA principles, rather than *retroactivity* considerations under AEDPA, (2) a non-criminal alien (e.g., Costa had no need to make strategic choices) rather than a criminal-alien making strategic choices when defending against pre-AEDPA criminal charges, (3) an alien who was *already* on notice of the impending shift from suspension of deportation to cancellation of removal and used that information in his decision-making process (i.e., Wallace had no notice of § 440(d)'s shift in law), and (4) a non-habeas, direct Petition for Review case in which the agency's time tables, starting points, and regulations *were important* regarding judicial review. The court failed to recognize these differences and improperly blurred the line between Section 1252(g)'s "prosecutorial discretion" considerations found in *Cortez-Felipe*, and when proceedings are "pending" for purposes of "retroactivity" under § 440(d). Cortez had *notice* of the law and tried to take advantage of it; Armendariz had *neither* opportunity at the time he decided to go to trial.

Similarly, in *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000), the Seventh Circuit *recognized* the distinction between Section 1252(g)'s bar of review and the "retroactivity" concerns of § 440(d). In that case, an alien who was determined to have attempted to smuggle contraband into the United States was initially issued a "Notice to Applicant for Admission Detained for Hearing"

and referred for "exclusion" proceedings under former 8 U.S.C. § 1226 (1994). Thereafter, the INS failed to file the charging document with the Court and instead issued a "Notice to Appear" under newly enacted 8 U.S.C. § 1229b (Supp. IV 1998). In that case, the Seventh Circuit concluded that "Congress has explicitly restricted our ability to review the decision by the Attorney General's delegates to commence proceedings, *see* 8 U.S.C. § 1252(g), so our review is limited to whether this discretion to commence proceedings empowered the Attorney General to issue regulations on when proceedings must be adjudged to have commenced." *See Morales-Ramirez v. Reno*, 209 F.3d at 982 (emphasis added.) As the First Circuit's decision in *Costa*, the Seventh Circuit's decision was premised upon this Court's holding that jurisdiction was limited under § 1252(g), so as to not interfere with the Attorney General's decision to "commence" exclusion proceedings when removal proceedings had already been commenced. Here, there is no dispute whether "deportation" proceedings were commenced. Mr. Armendariz was not initially referred for "deportation" proceedings and then referred to "removal" proceedings. The issue, here, is one of "*retroactivity.*" As in *Cortez* and *Costa*, this case *does not involve a served but unfiled* charging document. The Seventh Circuit explained that it declined to follow the First and Eleventh Circuits' holdings since those cases involved different facts, and because the Court had reached an opposite conclusion regarding the retroactivity of § 440(d) of the AEDPA. *Morales-Ramirez*, 209 F.3d at 983 ("[In *Wallace* and *Alanis-Bustamante*] the courts concluded that the relevant inquiry lay not in when proceedings actually commenced, but when the reliance interests of aliens should be considered for purposes of determining whether sec. 440(d) should be retroactively applied."). *See also LaGuerre v. Reno*, *supra*, at 1041. Nevertheless, the Seventh Circuit's reasoning is substantially in line with the First and Eleventh Circuits.

Although the panel's decision cited to various decisions for the proposition that a case commences with the filing of an OSC before an Immigration Judge, none of these decisions have reached that conclusion with *any* analysis. *See Orantes v. Thornburg*, 919 F.2d 549, 553 (9th Cir. 1990) (reciting former regulation without analysis); *See, e.g., Howell v. INS*, 72 F.3d 288, 290 (2d Cir. 1995) (reciting former regulation without analysis); *Dokic v. INS*, 899 F.2d 530, 531-32 (6th Cir. 1990) (same). Conversely, the First and Eleventh Circuits addressed this precise issue and concluded in favor of Mr. Armendariz's claim. In *Wallace v. Reno*, 194 F.3d at 286-287, the First Circuit concluded that the *alien's perspective* is the relevant one for determining when a proceeding "commences" for purposes of deciding which statutory rules apply. Like the Eleventh Circuit in *Mayers v. United States Dept. of INS*, 175 F.3d at 1289, 1301 (11th Cir. 1999), the First Circuit in *Wallace* refused to retroactively apply AEDPA § 440(d) to pending deportation proceedings. In doing so, the First Circuit reasoned that:

> In this case, we are not concerned with INS's [sic] internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This question turns on considerations unrelated to the purpose of INS regulations – primarily . . . with the evil Congress sought *to prevent and the realities of reasonable reliance or settled expectations* on the part of litigants. From this standpoint, we think that when an *Order to Show Cause is served* on the alien, the deportation process has effectively begun and *expectations properly form*, even if there is *no actual reliance*.

Id. (emphasis added.).

More compelling is the Eleventh's Circuit's holding in *Alanis-Bustamante v. Reno*, 201 F.3d at 1309. There, Bustamante was served with an OSC *and* a Warrant of Detainer in June, 1995 during the pendency of his state

incarceration. *Id.* The INS, however, did not file the OSC with the Immigration Court, at all. During the next two (2) years, Bustamante remained incarcerated serving his sentence. Meanwhile, Congress passed the AEDPA and the IIRIRA. In June, 1997, *instead of filing* the OSC, the INS administratively canceled the OSC and issued a "Notice to Appear" to begin removal proceedings. At his removal hearing, Bustamante requested a § 212(c) waiver under former "deportation" proceeding provisions.

The Eleventh Circuit found that the BIA erred in concluding Bustamante was ineligible for a § 212(c) waiver, finding that the combination of the *service* of the OSC *and* the *lodging* of the warrant of detainer was sufficient to "commence" proceedings for purposes of determining the applicable law pertaining to discretionary waivers under former § 212(c). The Court ruled that to "conclude otherwise not only risks undermining the reasonable expectations of an alien, it also ignores the INS' power over an alien once it issues an OSC." The Eleventh Circuit went on to note that "[c]onsiderations of fairness convince us that for purposes of deciding which law applies, the removal proceedings in this case should be viewed as commencing at least on that date, June 28, 1995, when the show cause order *had been served* and the warrant of detainer lodged." *Id.* (emphasis added.)

B. The Panel's Decision Erodes The Court's *Landgraf* Retroactivity Analysis By Requiring Reliance To Find A Retroactive Effect For Aliens Convicted By Jury Trial.

The panel's decision is in conflict with this Court's *Landgraf* analysis and the Circuit's retroactivity analysis regarding AEDPA § 440(d) for convictions prior to the statute's amendments. *INS v. St. Cyr, supra*; *Magana-Pizano v. INS*. This Court in *St. Cyr*, concluded that aliens in *either* "deportation" or "removal" proceedings remain

eligible for a § 212(c) waiver, whose convictions were obtained through *plea* agreements, and who, notwithstanding those convictions, would have been eligible for § 212(c) relief under the law in effect at the time of their plea. *St. Cyr*, 533 U.S. at 326. Because this Court was not confronted with the "jury trial" issue, it had no reason to extend its holding beyond the facts as then-presented. *Id.* Nevertheless, this Court's holding naturally extends to aliens convicted by way of jury rather than by plea.

Here, the critical issue is whether an alien convicted by jury trial, relying upon pre-AEDPA law in the course of his strategic decision-making process, is prejudiced by § 440(d), such that it constitutes a "retroactive effect." In *St. Cyr*, the Court found that there was no express Congressional intent in the AEDPA nor IIRIRA to apply the changes in § 212(c) relief, retroactively. *Id.* In this regard, the Court concluded that the *Landgraf* presumption against applying new statutes retroactively applies to issues of eligibility for discretionary relief from deportation. *St. Cyr*, 533 U.S. at 323. The Court found that altering the form of relief available constituted a "new disability." *St. Cyr*, 533 U.S. at 321.

Importantly, the court embraced a *broad* statement of the factors relevant to determining what constitutes a "retroactive effect." *Id.* Quoting *Landgraf, supra*, at 268-269, the Court stated that a statute has a retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr, supra,* at 321. Specifically, the Court noted the "quid pro quo" arrangement by plea which can be understood as contributing to the conclusion that retroactive elimination of § 212(c) relief in the plea context is an "obvious and severe retroactive effect." *Id.* at 322.

Here, the Panel incorrectly concluded that "aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about

§ 440(d)." On the contrary, if aliens deciding to risk going to trial had been aware of § 440(d) at the time of their decision, they might have elected to accept a plea agreement in lieu of risking going to trial. If Mr. Armendariz had known that § 440(d) would result in his *mandatory* deportation should he *lose* at trial, he would have had a greater incentive towards accepting a plea agreement to avoid a negative impact upon his immigration status (e.g., by accepting a plea to solicitation to sell cocaine). *See Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (holding that solicitation under Arizona law does not constitute a deportable offense); *Accord Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999). However, if an alien believes that even if he went to trial and *lost* he would *still be eligible* for a § 212(c) waiver, his "reliance" upon the information that was available to him at the time of his strategic decision-making process constitutes the same "quid pro quo" arrangement this Court found to be sufficient. *St. Cyr*, 533 U.S. at 322 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation"). *See also Magana-Pizano,* 200 F.3d at 612 ("That an alien charged with a crime . . . would factor the immigration consequences of their conviction in deciding whether to plead or proceed to trial is well-documented"); *see also* 3 Bender, Criminal Defense Techniques, §§ 60A.01, 60A.02 (1999) ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.").

Consequently, in the situation where an alien believed even if he went to trial and *lost*, he would *still remain eligible* for § 212(c), and he based his decision to go to trial on that information and the state of the law, then a change in the applicable rules after such a decision has been made constitutes an "obvious and severe retroactive effect." *St. Cyr,* 533 U.S. at 325. An alien in such a situation, indeed, has nothing to lose and would choose the path which affords him the best outcome both in terms of his criminal and immigration case; for even if he loses a trial, he

remains *eligible* for a § 212(c) waiver. Aliens are acutely aware of their privilege to remain in the United States, especially ones charged with criminal offenses. Thus, the "cost-benefit" analysis undertaken by an alien in deciding whether to accept a plea agreement or to risk going to trial are one and the same; the decision making process consists of "two sides of the same coin." Hence, the risks inherent in going to trial are *increased* if an alien knows, that if he were to lose, § 440(d) would bar him from discretionary relief and result in his *mandatory* deportation. The lower court's decision patently failed to recognize the strategic decisions aliens make[2] with respect to their criminal situation. The change in law, under AEDPA § 440(d), certainly has a direct, and predictable, impact on an alien's interest in avoiding deportation. The alien's choice of strategy, therefore, in his criminal proceeding may well be affected by the availability and chances of a § 212(c) waiver.

Additionally, there exists no *Landgraf* precedent which necessarily requires *reliance* or an "obvious and severe" effect in order to trigger the presumption against retroactivity. For example, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), a mere change in the law was found to have an impermissible retroactive effect when it resulted in "an increased likelihood of facing a qui tam lawsuit." The Court did not suggest, in that case, that Hughes Aircraft had been prejudiced by a "quid pro quo" arrangement. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("Removal of the *possibility* of a sentence of less than fifteen years . . . operates to [defendants'] detriment" (emphasis added)).

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[2] For example, in *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000), the alien specifically "entered into extensive plea negotiations, the sole purpose of which was to ensure that he got less than five years to avoid what would have been a statutory bar to 212(c) relief." *St. Cyr*, 533 U.S. at 323.

Whether a new statute attaches new legal consequences "demands a commonsense, functional judgment" that "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin v. Hadix*, 527 U.S. 343, 357-58 (1998). Prior to AEDPA § 440(d), aliens like Mr. Armendariz had a significant likelihood of receiving § 212(c) relief. Notwithstanding this, because Mr. Armendariz, and other aliens like him who were convicted by jury trial, certainly relied upon the likelihood and availability of § 212(c) relief in deciding whether to risk going to trial – and believing that even had they lost they would *still* remain eligible for § 212(c) relief (i.e., facing possible deportation) – the elimination of § 212(c) relief (i.e., facing mandatory deportation) by § 440(d) has an "obvious and severe" retroactive effect. *St. Cyr*, 533 U.S. at 325. The potential for unfairness in the retroactive application of § 440(d) to persons convicted by jury trial is no less significant or manifest than one convicted by plea colloquy.

Specific decisions made by an alien during the course of his criminal proceedings rise to the level of specific reliance upon the then-existing law (e.g., choosing to reject a plea, choosing to risk going to trial, belief in innocence, choosing to preserve his immigration status, choosing not to devote substantial resources to the criminal defense, choosing not to appeal in light of the risks faced on a retrial.) Such decisions have been treated as sufficient to establish a retroactive effect in many cases. *Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 786 (7th Cir. 2000) (refusing to allow agency to apply higher civil penalties to a defendant who would not have expected to face such risks at the time that he *decided how to* finance his defense). Finally, this Court noted that *reliance* is not required to show a genuine retroactive effect. *St. Cyr*, 533 U.S. at 321-23. Nevertheless, the decisions of various Circuits have inappropriately limited their retroactivity analysis to "reliance" driven approaches, undermining the Court's retroactivity principles. As this Court noted in *St. Cyr*, the retroactivity definition "'does not

purport to define the outer limit of impermissible retroactivity' "and merely "describes several '*sufficient,*' as opposed to '*necessary*' conditions for finding retroactivity." *St. Cyr*, 533 U.S. at 321 n.46. As the lower court's opinion was purportedly premised upon this Court's opinion in *St. Cyr*, clarification is needed.

Section 440(d) attached new "legal consequences" to events (i.e., decision-making calculus) completed before its enactment. *St. Cyr,* 533 U.S. at 322. By removing § 212(c) relief, § 440(d) clearly impaired Mr. Armendariz's ability to apply for that relief, and created a new "disability" with respect to his decision-making process.[3] An alien, in deciding whether to risk going to trial or to accept a plea agreement, bases his decision upon the information then-available. An alien in making his decision to risk going to trial with the belief that *even if he lost* would remain eligible for § 212(c) relief, is clearly prejudiced by AEDPA § 440(d)'s change at a time *after* he had already acted. By risking going to trial, an alien is implicitly acting in the manner to *preserve* his immigration status, both by avoiding the conviction which might render him deportable, and by ensuring that § 212(c) relief would *remain* available even in the event he lost. Section 440(d)'s elimination of any *possibility* of § 212(c) relief for people who risked going to trial with the expectations of reliance that they would be eligible for such relief clearly, therefore, "attaches a new legal disability, [with] respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269. Based upon this Court's *Landgraf* analysis coupled with the holding in *St. Cyr*, the court should have found that § 440(d) has an impermissible, retroactive effect for aliens convicted by jury trial. Thus, the court's decision is erroneous in this

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[3] *See e.g., Chambers v. Reno,* 307 F.3d at 294 (Goodwin, dissenting) ("I find the relevant conduct to be [the] crime of conviction rather than his decision to go to trial.")

respect. The outcome, here, is unduly harsh. And, Congress could not have intended such a result.[4]

C. Section 440(d) Of The AEDPA Violates Equal Protection, As Applied.

The guarantee of equal protection under the law has been held applicable to aliens as well as citizens for over a century. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73 (1886).

Armendariz challenged AEDPA's bar to section 212(c) relief on the constitutional ground that it precluded relief for aliens in deportation proceedings (resident aliens placed in deportation proceedings without having left the country), but not for those in exclusion proceedings (resident aliens stopped at the border on their return from abroad). The court of appeals determined that "Armendariz's equal protection claim is without merit" by indicating that the court had previously "rejected [an] identical challenge in *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), *overruled on other grounds, United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc)." App. 12a. In the panel's view, in *Estrada-Torres*, "we disagreed with the BIA's construction of § 440(d). *Id.* at

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[4] In fact, the legislative history supports the conclusion that Congress did not intend for § 440(d) to apply retroactively to convictions which pre-dated its enactment. The original Senate bill contained express language making the provision which became AEDPA § 440(d) retroactive. *See* 141 Cong. Rec. S7553, 7559 (daily ed. May 25, 1995) (containing text of Senate's version of AEDPA, and including in § 303 the provisions which eventually became included in AEDPA § 440). However, this language was eliminated by the conference committee and not included in the final bill. *See* H.R. Rep. No. 104-518, at 119 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 952 (adopting § 303(e)(4) of Senate bill without adopting the retroactivity provision contained in § 303(f)).

779-80. We held that despite § 440(d)'s plain language, it applies equally to exclusion and deportation proceedings. *Id.* Because Congress did not draw any distinction between aliens in deportation and those in exclusion proceedings, § 440(d) does not violate equal protection." App. 12a-13a.

The court of appeals misconstrued the holding of *Estrada-Torres*, and misapplied it to Armendariz's claim. As the Circuit previously noted in *Magana-Pizano*, "[petitioner] also argues that AEDPA § 440(d) violates the Equal Protection Clause, and that his case is *factually* and *legally distinguishable* from [*Estrada-Torres*]. However, we need not reach this issue because resolution of the question of retroactivity [in favor of petitioner] may make its consideration unnecessary." *Magana-Pizano*, 200 F.3d at 614, n.15 (emphasis added). Although the court of appeals did not address Armendariz's arguments distinguishing *Estrada-Torres* as a matter of law and fact, the court nevertheless concluded that it applied. App. 13a.

Resident aliens in deportation proceedings and exclusion proceedings have a constitutional right to due process. *See e.g., Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 329, 74 L. Ed. 2d 21 (1982). Numerous courts have recognized that it would be a violation of equal protection to refuse to hear petitions for discretionary relief from permanent resident aliens in deportation proceedings, but to consider such petitions from immigrants charged with the same offense and with the same ties to this country, merely because the latter had taken a brief trip abroad and been placed in exclusion proceedings upon their return. *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981); *See e.g., Francis v. INS*, 532 F.2d 268, 269 (2d Cir. 1976).

The equal protection principle generally does not countenance denying lawful permanent residents in deportation proceedings the same legal protection afforded similarly situated aliens in exclusion proceedings without a rational basis. In *Francis*, the Second Circuit held that

any distinction between deportable and excludable aliens "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Francis v. INS*, 532 F.2d at 272 (citing *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S. Ct. 1373, 1377, 43 L. Ed. 2d 688 (1975)).

Although the court of appeals cited to *Estrada-Torres*, for the proposition that equal protection is not violated, this is patently erroneous. At the time *Estrada-Torres*, was decided, the Ninth Circuit had ruled in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), amended by 159 F.3d 1217 (9th Cir. 1998) ("*Magana I*"), that it could not reach the merits of the petition because Congress had repealed the court's jurisdiction. The court also found that § 440(d) of the AEDPA violated the Suspension Clause of the Constitution and was therefore, unconstitutional. Since, this Court's remand of *Magana I*, and the court of appeals' decision in *Estrada-Torres*, the Ninth Circuit reissued its decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana II*"), and found that § 212(c) relief remains available to certain aliens in deportation proceedings. Nevertheless, the holding in *Estrada-Torres* was not modified by the Court's decision in *Magana II* to permit aliens in exclusion proceedings to apply for a § 212(c) waiver. The court of appeals misapprehended Armendariz's arguments, and denied his claim.

Recently, another panel of the court of appeals correctly addressed this *precise* issue. In *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002), the court of appeals held that the application of AEDPA § 440(d), barring § 212(c) relief, against deportable aliens during the window of time between the BIA's decision and the court's decision in *Estrada-Torres*, *violated* equal protection. Because the BIA had an administrative practice of permitting § 212(c) waivers to aliens in exclusion, *before Estrada-Torres* interpreted the statute to hold otherwise, equal

protection was violated. *Servin-Espinoza,* 309 F.3d at 1197 ("[w]e are thus faced with an equal protection challenge to an administrative policy that violated a statutory command"). Thus, the hybrid scheme of allowing a § 212(c) waiver to certain aliens whilst denying them to other aliens had been resurrected. *See Matter of Silva,* 16 I&N Dec. 26, 29-30 (BIA 1976) (embracing Second Circuit's decision in *Francis).* In addition, this Court's decision in *St. Cyr,* permitting § 212(c) waivers for deportable aliens continues the distinction found to violate equal protection, at least in the Ninth Circuit (i.e., aliens in exclusion proceedings are ineligible for a § 212(c) waiver whilst those in deportation or removal may apply). *Tapia-Acuna v. INS, supra.*

As in *Servin-Espinoza,* before the BIA denied Armendariz's claim to § 212(c) relief in October, 1997, the BIA had extended § 212(c) waivers to excludable aliens since its decision in May, 1997 (in *Fuentes-Campos) before Estrada-Torres* overruled it, a practice which violates equal protection. App. 46a-47a. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County,* 488 U.S. 336, 109 S.Ct. 633 (1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 2003

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Hugo Armendariz-Montoya, *Petitioner-Appellee*, v. Roseanne C. Sonchik, District Director, Immigration and Naturalization Service, *Respondent-Appellant.*	No. 01-16029 D.C. No. CV-00-00422-RGS OPINION

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, Jr., District Judge, Presiding

Argued and Submitted
April 9, 2002 – San Francisco, California

Filed May 30, 2002

Before: Diarmuid F. O'Scannlain and
Richard C. Tallman, Circuit Judges, and
Samuel P. King*, District Judge.

Opinion by Judge O'Scannlain

COUNSEL

Shelly Goad, Department of Justice, Office of Immigration Litigation, Washington, D.C., argued the cause for the

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

respondent-appellant. Robert D. McCallum, Jr., Assistant Attorney General, Stuart E. Schiffer, Acting Assistant Attorney General, David J. Kline, Principal Deputy Director, and Hugh G. Mullane, Office of Immigration Litigation, Washington D.C.; Paul K. Charlton, United States Attorney and Cynthia Parsons, Assistant United States Attorney, Phoenix, Arizona, were on the briefs.

Vikram K. Badrinath argued the cause for the petitioner-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether deportation proceedings commence with the service of an order to show cause upon the alien or with the filing of such an order with the Immigration Court.

I

In 1972, Hugo Armendariz-Montoya ("Armendariz") entered the United States without inspection from Mexico when he was three years old. In 1978, he adjusted his status to that of a lawful permanent resident. He has resided in the United States since his entry.

In 1994, the state of Arizona indicted Armendariz for possession of cocaine with the intent to distribute. Armendariz pleaded not guilty, electing a jury trial. In September 1995, he was convicted and sentenced to five years, eight months imprisonment. His subsequent appeals were unsuccessful.

On September 22, 1995, the Immigration and Naturalization Service ("INS") lodged a detainer on Armendariz with the Arizona Department of Corrections. On April 5, 1996, the INS issued an order to show cause ("OSC"), charging Armendariz as deportable for having committed a qualifying controlled substance offense and an aggravated felony. *See* 8 U.S.C. § 1251(a)(2)(A)(iii), (B)(i) (1994) (current version at 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i)). On April 22, 1996, the INS served the OSC upon Armendariz and on December 19, 1996, it filed the order with the Immigration Court.

In April 1997, an Immigration Judge ("IJ") conducted a deportation hearing. Armendariz conceded deportability, but sought a discretionary waiver of inadmissibility under INA § 212(c). Section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was enacted on April 24, 1996, categorically negates § 212(c) relief for those aliens deportable for having committed a qualifying controlled substance offense or an aggravated felony.[1] Pub. L. 104-132, 110 Stat. 1214, 1277. The IJ determined that AEDPA § 440(d) applied to Armendariz who was thus ineligible for a § 212(c) waiver.

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") repealed § 212(c) entirely, replacing it with a new form of discretionary relief called "cancellation of removal." *See* Pub. L. No. 104-208, § 304(b), 100 Stat. 3009, 3009-597 [sic] (1996) (codified at 8 U.S.C. § 1229b). However, IIRIRA's transitional rules maintain the availability of § 212(c) relief, subject to AEDPA § 440(d). *See* IIRIRA § 309(c)(1), 100 Stat. at 3009 625 (*reprinted at* 8 U.S.C. § 1101, Historical and Statutory Notes). Armendariz's proceedings fall within IIRIRA's transitional rules. *See, e.g., Kalaw v. INS*, 133 F.3d 1147, 1150-51 (9th Cir. 1997). Therefore, IIRIRA's repeal of § 212(c) does not affect Armendariz.

Armendariz appealed to the Board of Immigration Appeals ("BIA"), which affirmed. He subsequently filed a petition for review with this court, but we dismissed for lack of jurisdiction. *See Armendariz-Montoya v. INS,* No. 97-71305 (9th Cir. Feb. 29, 2000); *see also* IIRIRA § 309(c)(4)(G), 100 Stat. at 3009-626 to 627 (*reprinted at* 8 U.S.C. § 1101, Historical and Statutory Notes) (stripping jurisdiction over claims on direct review for aliens deportable for certain grounds).

In March 2000, Armendariz filed a habeas petition with the district court. *See INS v. St. Cyr,* 533 U.S. 289, 314 (2001) (holding that neither AEDPA nor IIRIRA repealed habeas jurisdiction under 28 U.S.C. § 2241). He argued that AEDPA § 440(d) is inapplicable to his deportation proceedings. Alternatively, he claimed that § 440(d) violates the Equal Protection Clause.

The magistrate judge recommended that the court grant the petition based on his conclusion that Armendariz's deportation proceedings commenced with the *service,* not with the *filing,* of the OSC. Since the INS served the OSC two days before the enactment of AEDPA, the magistrate concluded that § 440(d) was inapplicable and thus he was eligible to seek a § 212(c) waiver. The magistrate declined to address Armendariz's contention that § 440(d) violates equal protection.

The district court adopted the magistrate's recommendation without comment. The INS noted a timely appeal.

II

Whether AEDPA § 440(d) applies, depends, of course, on the date Armendariz's deportation proceedings

commenced. *Cortez-Felipe v. INS,* 245 F.3d 1054 (9th Cir. 2001) tells us that deportation proceedings commence with the filing of the OSC with the Immigration Court. In *Cortez,* the alien suspected that the INS would initiate deportation proceedings. IIRIRA was set to take effect on April 1, 1997. However, by late March 1997, the INS had not taken any action. In the hope of avoiding IIRIRA's amendments, the alien contacted the INS to request initiation of deportation proceedings before April 1. On March 27, the INS served the OSC, but did not file it until after IIRIRA became effective.

In holding that proceedings commenced with the filing of the OSC, we relied upon INS regulations to this effect. *See* 8 C.F.R. § 3.14(a) ("[P]roceedings . . . commence when a charging document is filed with the Immigration Court by the Service."); *id.* § 239.1(a) ("Every . . . proceeding . . . to determine the deportability . . . of an alien is commenced by the filing of a notice to appear with the Immigration Court . . . . "); *id.* § 240.55 ("A deportation proceeding is commenced by the filing of [the OSC] with the Immigration Court, and an alien is considered to be in deportation proceedings only upon such filing. . . . "). We also stressed that our previous decisions have uniformly stated that deportation proceedings commence with the filing of the OSC. *See El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review,* 959 F.2d 742, 749 (9th Cir. 1992) ("A deportation proceeding commences with the filing of an order to show cause."); *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549, 554 (9th Cir. 1990) ("[A] proceeding to determine the deportability of the alien is commenced by an immigration official who issues and files an order to show cause with the Office of the Immigration Judge."); *see also Matter of Sanchez,* 20 I. & N. Dec. 223, 225 (BIA Sept. 21,

1990) ("Jurisdiction vests and proceedings commence before an immigration judge when a charging document is filed with the Office of the Immigration Judge. . . .").

Nevertheless, Armendariz argues that *Cortez* is distinguishable because it arose in the context of IIRIRA, not AEDPA. Armendariz also claims that *Cortez* is distinguishable because the INS lodged a detainer in this case. We take up his contentions in turn.

A

Armendariz correctly notes that the First Circuit has drawn a distinction between IIRIRA and AEDPA in determining when deportation proceedings commence. *Wallace v. Reno,* 194 F.3d 279 (1st Cir. 1999), presented materially identical circumstances to this case, *i.e.,* the applicability of AEDPA § 440(d) turned on whether deportation proceedings commenced with the service or with the filing of the OSC. *Id.* at 287. The court held that deportation proceedings commenced with the service of the OSC. The court refused to accord any deference to the relevant INS regulations. The court stated,

> In this case we are not concerned with the INS's internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. [The] question turns on . . . the realities of reasonable reliance or settled expectations on the part of litigants. . . . [W]e think that when an order to show cause is served on the alien, the deportation process has effectively begun and expectations properly form, even if there is no actual reliance. *Id.*

In other words, *Wallace* held that § 440(d)'s potential retroactive effect militates against holding that proceedings commence with the filing of the OSC.

Wallace was followed by *Costa v. INS,* 233 F.3d 31(1st Cir. 2000). *Costa* presented the identical circumstances present in *Cortez;* the applicability of IIRIRA's permanent amendments turned on whether deportation proceedings commenced with the service or with the filing of the OSC. The court held that deportation proceedings commenced with filing and distinguished *Wallace* on the ground that the potential retroactive effect of AEDPA § 440(d) is greater than that of IIRIRA's permanent amendments. *Id.* at 35-36. It also stressed that *Wallace* arose in the context of habeas, while *Costa* involved a petition for review. *Id.* at 36. According to *Costa,* courts owe greater deference to INS regulations in direct review cases. *Id.* As such, *Costa* owed more deference than *Wallace* to the INS regulations providing that deportation proceedings commence with the filing of the OSC.

We decline to follow the First Circuit's distinction between AEDPA and IIRIRA in determining when deportation proceedings commence. *Cortez* does not allow it, and states in sweeping terms that deportation proceedings commence with the filing of the OSC. 245 F.3d at 1056-57. *Cortez* accorded great weight to the relevant INS regulations, which do not allow for a different outcome depending upon whether a particular section of AEDPA or IIRIRA is involved. *See* 8 C.F.R. § 3.14(a); *id.* § 239.1(a); *id.* § 240.55.

In any event, we find the First Circuit's distinction unpersuasive. *Wallace* inappropriately considered the potential retroactive effect of § 440(d) in determining when deportation proceedings commence. A determination of

when deportation proceedings commence stands apart from a consideration of § 440(d)'s potential retroactive effect. As will be discussed shortly, even though deportation proceedings commence with filing, § 440(d) does not apply if its application would result in an a retroactive effect. Finally, we are also unpersuaded by *Costa* that the time deportation proceedings commence should turn on whether a particular section of AEDPA or IIRIRA is involved.

B

Armendariz also claims that *Cortez* is distinguishable because the INS issued a detainer in this case. In particular, he relies upon the Eleventh Circuit's decision in *Alanis-Bustamante v. Reno,* 201 F.3d 1303 (11th Cir. 2000).

In that case, the INS served an OSC upon the alien while he was imprisoned in June 1995. The INS also contemporaneously lodged a detainer with prison authorities. However, the INS did not file the OSC until June 1997. The court held that the combination of the service of the OSC with the lodging of the detainer "is enough to commence proceedings for purposes of determining the applicable law." *Id.* at 1310. The court explained that the two actions afforded the INS considerable power over the alien. *Id.* at 1310. Specifically, the actions gave the INS the power to prevent Bustamante's release from custody at the conclusion of his prison term.

In *Cortez,* the INS did not lodge a detainer. Armendariz urges us to adopt the logic of the Eleventh Circuit, and hold that deportation proceedings commence with the service of the OSC if a detainer is contemporaneously lodged. *Cortez* does not allow for such a rule. The relevant

INS regulations make the filing of the OSC, not the lodging of a detainer, the critical event.

C

In sum, *Cortez* dictates that Armendariz's proceedings commenced with the filing of the OSC. Because the INS did not file the OSC until December 1996, his proceedings were not pending at the time of AEDPA's enactment.

III

Armendariz further argues that even if his deportation proceedings commenced after the enactment of AEDPA, § 440(d) is nonetheless inapplicable. Specifically, he contends that application of § 440(d) would result in an impermissible retroactive effect.

When a statutory provision lacks an effective date, we first ask whether Congress has prescribed its temporal reach. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). "If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. If so, then in keeping with our 'traditional presumption' against retroactivity, we presume that the statute does not apply to that conduct." *Martin v. Hadix*, 527 U.S. 343, 352, (1999).

We previously observed that Congress did not prescribe § 440(d)'s temporal reach. *See Magana-Pizano*, 200 F.3d 603, 612 (9th Cir.1999). Therefore, § 440(d) applies to Armendariz unless its application would result in a retroactive effect. *See, e.g., Martin*, 527 U.S. at 352.

In *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001), the Supreme Court held that application of § 440(d) to those aliens who pleaded guilty prior to AEDPA's enactment results in a retroactive effect. At the time of plea, those aliens had the possibility of obtaining a § 212(c) waiver of inadmissibility. Section 440(d) eliminated that possibility. If those aliens had been aware of § 440(d) at the time of plea, they might have elected to proceed to trial in lieu of pleading guilty. *Id.* at 323.

However, as we held in *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000), application of § 440(d) to those aliens who were convicted after a jury trial does not result in a retroactive effect. Unlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about § 440(d). As the Seventh Circuit explained,

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation. *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998).

Armendariz pleaded not guilty and elected a jury trial. Therefore, application of § 440(d) does not result in any retroactive effect. Accordingly, § 440(d) is applicable, and Armendariz is barred from seeking § 212(c) relief.

IV

Armendariz lastly claims that if § 440(d) applies, it violates equal protection. While neither the magistrate nor the district court reached this issue, it raises a pure question of law that may be answered by this court in the first instance. *See, e.g., Crawford v. C.I.R.,* 266 F.3d 1120, 1121 (9th Cir. 2001).

Armendariz's argument is rooted in the history of the availability of § 212(c) waivers. Before IIRIRA, the INA distinguished between exclusion proceedings, which were brought against aliens attempting to enter the United States (including those returning to the United States), and deportation proceedings, which were brought against aliens already present in the United States. *See, e.g., Requena-Rodriguez v. Pasquarell,* 190 F.3d 299, 308 (5th Cir. 1999).

Section 212(c) provides, "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily . . . and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . " 8 U.S.C. § 1182(c) (repealed 1996). By its plain terms, § 212(c) applies only to exclusion proceedings, *i.e.,* aliens seeking to return to the United States. *See, e.g., Requena-Rodriguez,* 190 F.3d at 308. However, in a series of decisions in the 1950s and 1960s, the BIA interpreted § 212(c) to apply to certain aliens in deportation proceedings. *See Arias-Uribe v. INS,* 466 F.2d 1198, 1199-1200 (9th Cir. 1972) (collecting cases). Specifically, the BIA held that § 212(c) waivers were available to those aliens in deportation proceedings who had left the United States, but who had successfully returned to the country. *See, e.g., Matter*

of G.A., 7 I & N Dec. 274 (BIA July 19, 1956). Section 212(c) relief was unavailable to those aliens in deportation proceedings who had never left the United States. *See, e.g., Arias-Uribe,* 466 F.2d at 1199-1200.

In *Francis v. INS,* 532 F.2d 268 (2d Cir. 1976), the Second Circuit held that the BIA's distinction among deportable aliens was irrational. The BIA later embraced this decision, holding that § 212(c) is available for all aliens in deportation proceedings. *See Matter of Silva,* 16 I. & N. Dec. 26, 29-30 (BIA Sept. 10, 1976); *see also Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir. 1981) (approving of *Silva*).

Section 440(d) makes § 212(c) relief unavailable to legal permanent residents "who are *deportable* by reason of having committed" an aggravated felony. 110 Stat. at 1277 (emphasis added). The BIA has held that the term "deportable" means that § 440(d) only applies to aliens in deportation, as opposed to exclusion, proceedings. *See In re Fuentes-Campos,* 21 I. & N. Dec. 905, 907-10 (BIA May 14, 1997).

Armendariz argues that § 440(d) revives an irrational distinction between aliens in exclusion and deportation proceedings. We rejected the identical challenge in *United States v. Estrada-Torres,* 179 F.3d 776 (9th Cir. 1999), *overruled on other grounds, United States v. Rivera-Sanchez,* 247 F.3d 905, 909 (9th Cir. 2001) (en banc). In that case, we disagreed with the BIA's construction of § 440(d). *Id.* at 779-80. We held that despite § 440(d)'s plain language, it applies equally to exclusion and deportation proceedings. *Id.* Because Congress did not draw any distinction between aliens in deportation and those in

exclusion proceedings, § 440(d) does not violate equal protection. *Id.*

While our sister circuits have uniformly rejected an identical challenge, they have employed different reasoning from that of *Estrada-Torres*. *See Domond v. INS*, 244 F.3d 81, 87 88 (2d Cir. 2001); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152-53 (10th Cir.1999); *Requena-Rodriguez*, 190 F.3d at 309; *DeSousa v. Reno*, 190 F.3d 175, 185 (3d Cir. 1999); *LaGuerre*, 164 F.3d at 1041. These circuits have adopted the BIA's interpretation that § 440(d) only applies to deportation, and not to exclusion proceedings. Our sister circuits, however, have concluded that it is rational to apply a harsher standard to deportation proceedings. As the Third Circuit explained,

> In order to aid the United States in expelling criminal aliens from the country, Congress rationally could have decided to encourage such aliens to voluntarily leave the country as a carrot to a potential waiver of removal when they sought reentry. Creating such an incentive may have appeared desirable to Congress for several reasons. First, Congress could have rationally speculated that not all aliens who voluntarily left the country would return. Second, because exclusion proceedings provide fewer procedural protections than deportation proceedings, Congress may have reasoned that encouraging aliens to seek waivers through the exclusion process would decrease the United States' administrative costs in expelling criminal aliens. *DeSousa*, 190 F.3d at 185.

These decisions have stressed that Congress did not revive an arbitrary distinction in passing § 440(d). The BIA previously had drawn a distinction *among* aliens in

deportation proceedings; § 440(d) draws a distinction between exclusion and deportation proceedings as a whole. In any event, *Estrada-Torres* dictates that Armendariz's equal protection claim is without merit.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Hugo Armendariz-Montoya, Petitioner, vs. Roseanne C. Sonchik, District Director, U.S. Immigration and Naturalization Service, Respondent.	No. CIV 00-422 PHX-RGS (LOA) **REPORT AND RECOMMENDATION** (Filed Oct. 13, 2000)

This matter arises on Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2441.[1] (document #1) Respondent filed a response to the Petition on March 20, 2000 (document #13) to which Petitioner replied on March 31, 2000 (document #15). Also pending is Respondent's Motion to Dismiss (document #18) filed May 5, 2000 to which Petitioner replied on June 13, 2000 (document #21).[2]

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[1] Petitioner also filed a motion for temporary restraining order (document #7) and preliminary injunction (document #11). The District Court granted both motions (document ##10, 22) and ordered that Respondent is enjoined from executing an order of deportation against Petitioner or otherwise placing him beyond the Court's jurisdiction until a final judgment is entered in this matter. (*Id.*)

[2] In a March 9, 2000 Order (document #2), the Court directed Respondent to answer the Petition. The Court further ordered that "Respondent shall not file a dispositive motion in place of an answer without first showing cause as to why an Answer is inadequate." (*Id.*) Here, Respondent filed both an Answer and a dispositive motion without establishing the inadequacy of an Answer. Moreover, the Answer and the Motion to Dismiss present the same arguments in response to Petitioner's claims regarding the applicability of § 440(d). The Court, therefore, finds the Motion to Dismiss redundant and in

(Continued on following page)

FACTUAL and STATUTORY BACKGROUND

Petitioner is a native and citizen of Mexico who entered the United States without inspection on June 19, 1972. (document #1 at 4) On May 23, 1978, he adjusted his status to lawful permanent resident. (document #1 at 4) On September 15, 1995, Petitioner was convicted of Unlawful Possession of Cocaine for Sale in the Superior Court of Arizona, Pima County, in violation of Ariz. Rev. Stat. §§ 13-3408(A)(2), (B)(2), (D), and (F). (Respondents' Exh. A)[3]

Under the Immigration and Nationality Act, an alien convicted of any controlled substance violation, such as Petitioner, is deportable. See, INA § 241(a)(2)(B)(I), 8 U.S.C. § 1251(a)(2)(B)(I)(1994), renumbered as INA § 237, 8 U.S.C. § 1277(a)(2)(B)(I). (Supp. 1996) Thus, on April 5, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause charging Petitioner with deportability under the Immigration and Nationality Act ("INA") § 241(a)(2)(B)(I), 8 U.S.C. § 1251(a)(2)(B)(I) based on his conviction of possession of a controlled substance. (Respondents' Exh. B) The Order to Show Cause was served on Petitioner on April 22, 1996. (Respondents' Exh. C) Prior to the issuance and service of the Order to Show Cause, on September 22, 1995, INS lodged a detainer against Petitioner with the Arizona Department of Corrections. (Exhibit E to document #21) On December 19, 1996,

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violation of the Court's March 9, 2000 Order and will recommend that the District Court strike that motion. See, FED.R.CIV.P. 12(g).

[3] Unless otherwise indicated, citations to "Respondents' Exh." are to exhibits to document #13, Respondent's Response and Objections to Petitioner's Writ of Habeas Corpus.

the INS filed the Order to Show Cause with the immigration court. (Respondents' Exh. D)

During the deportation proceedings, Petitioner filed an Application for a Waiver of Inadmissibility and requested relief pursuant to former § 212(c) of the INA, 8 U.S.C. § 1182(c). Prior to the 1996 amendments to the INA, aliens found deportable could seek a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c)(1994).[4] Specifically, prior to 1996, INA § 212(c) authorized the Attorney General to "permit a worthy alien to stay in this country in order to avoid extraordinary hardship to the alien's family in the United States." *Cyr v. INS*, ___ F.3d ___, No. 99-2614, 2000 WL 1234850 (2d Cir., September 1, 2000).

After Petitioner's deportation proceeding commenced, but before it concluded, Congress enacted two statutes amending the INA: These statutes, the AEDPA and the

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[4] Former § 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [provisions setting forth various ground [sic] for exclusion] . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years.

8 U.S.C. § 1182(c)(1994), repealed by IIRIRA § 304(b), (September 30, 1996).

Courts interpreted section 212(c) to permit the Attorney General to waive deportation under certain conditions. See, *Buitrago-Cuesta v. INS*, 7 F.3d 291, 292 (2d Cir. 1993).

IIRIRA were enacted April 24, 1996 and September 30, 1996, respectively.[5] Relevant to this matter, these amendments curtailed the Attorney General's authority to waive deportation for certain classes of felonies. Specifically, § 440(d) of the AEDPA expanded the category of convictions which would render an alien ineligible for § 212(c) relief.[6] Under INA § 212(c), as amended by AEDPA § 440(d), waivers could no longer be granted to aliens convicted of certain drug offenses regardless of the length of imprisonment. See, AEDPA § 440(d). The IIRIRA further changed the waiver rules. The IIRIRA contains two sets of provisions, transitional and permanent. The transitional rules, not codified, apply to deportation proceedings commenced before April 1997 in which the deportation order became final after October 30, 1996. *Kalaw v. INS,* 133 F.3d 1147, 1150 (9th Cir. 1997). Here, the INS issued the Order to Show Cause on April 5, 1996, it was served on April 22, 1996, and filed on December 16, 1996. The deportation order became final after October 30, 1996. Therefore, the transitional rules govern this matter. See, IIRIRA § 309(c).

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[5] Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Illegal Immigration Responsibility and Reform Act ("IIRIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 309-546.

[6] Section 440(d) provided:

> This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I).

AEDPA § 440(d).

Subsequent to the enactment of the AEDPA, on April 16, 1997, the Immigration Judge found that a § 212(c) waiver was no longer available to Petitioner pursuant to § 440(d) of the AEDPA. (Respondents' Exh. E) On May 9, 1997, Petitioner timely appealed the Immigration Judges decision to the Board of Immigration Appeals ("BIA"). On October 23, 1997, the BIA affirmed the Immigration Judge's denial of Petitioner's request for § 212(c) relief on the ground that the Attorney General's decision in *Matter of Sariano,* Interim Dec. No. 3289, (A.G. February 21, 1997)[7] interpreting AEDPA § 440(d) made Petitioner ineligible for § 212(c) relief. (Respondents' Exh. F) On November 21, 1997, Petitioner filed a Petition for Review with the United States Court of Appeals for the Ninth Circuit which was dismissed on February 29, 2000. (Respondents' Exh. G)

On or about September, 1999, Petitioner was released into the custody of the INS, arrested, and transported to Florence SPC for initial processing and execution of the final order of deportation. (document #1) On March 9, 2000, Petitioner filed the pending petition for habeas relief pursuant to 28 U.S.C. § 2241 (document #1) claiming that: (1) the retroactive application of § 440(d) of the AEDPA to his deportation proceedings pending on the date of the

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[7] Recently, the Attorney General has proposed regulations that would permit parties adversely affected by erroneous rulings to reopen their cases before the BIA which would effectively reverse the Attorney General's position in *Matter of Soriano.* See, *Ramos-Biruta v. INS,* 200 WL 1359593, *1 (9th Cir., August 11, 2000) (unpublished) (citing Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 65 Fed. Reg. 44, 476 (2000) (to be codified at 8 C.F.R. pts. 3 and 212) (proposed July 18, 2000).

AEPDA's enactment violates due process; (2) the application of § 440(d) to aliens in deportation proceedings and not in exclusion proceedings violates the Equal Protection Clause; and (3) Petitioner's mandatory detention pursuant to 8 U.S.C. § 1226(c) violates due process. (document #1). Although Respondent concedes that this Court has subject matter jurisdiction (document #13), the Court will briefly address this issue.

SUBJECT MATTER JURISDICTION

The IIRIRA and the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.) ("AEDPA") amended the INA. "Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods: (1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241." *Magana-Pizano v. Immigration and Naturalization Service,* 200 F.3d 603, 608 (9th Cir. 1999). The permanent provisions[8] of the IIRIRA repealed INA § 106, the former section

[8] The IIRIRA contained two sets of provisions. The transitional provisions which are not codified in the United States Code and the permanent provisions. The transitional provisions provide that the permanent provisions of IIRIRA do no apply to aliens involved in deportation proceedings commenced prior to April 1, 1997. *See,* IIRIRA § 309(c)(1). The transitional provisions of IIRIRA apply in this case because Petitioner's deportation proceedings commenced before April 1, 1997.

governing judicial review. 8 U.S.C. § 1252 (West Supp. 1997).

As previously stated, the transitional rules of the IIRIRA govern this case. Section 309(c)(4)(G) of the transitional rules provides, in pertinent part:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or by any offense covered by section 241(a)(2)(A)(I) of such Act (as so in effect).

Id. Thus, under the transitional rules, Petitioner's only means of seeking relief is a habeas corpus petition pursuant to § 2241.

With respect to judicial review, § 306(a)(2)(C) of the IIRIRA's permanent provisions provides that:

> [n]otwithstanding any other provision of law, *no court shall have jurisdiction* to review any final order of removal against an alien who is removable by reason of having committed [certain enumerated offenses including aggravated felonies.]

IIRIRA 306(a)(2)(C), codified as 8 U.S.C. § 1252(a)(2)(C) (1996) (emphasis added).

The statutory scheme governing judicial review is further complicated by INA § 242(g), codified as 8 U.S.C. § 1252(g), and § 1252(b)(9). Section 1252(g) provides that:

> Except as provided in this section and notwithstanding any other provision of law, *no court shall have jurisdiction* to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Id. (emphasis added)

Section 1252(b)(9) provides that:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in *judicial review* of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added).

As Respondent concedes, the Ninth Circuit has considered the impact of these provisions on the District Court's jurisdiction over § 2241 petitions and concluded that neither the AEDPA nor the IIRIRA's transitional and permanent rules repeal the statutory habeas remedy available in 28 U.S.C. § 2241. *Flores-Miramontes v. INS,* 212 F.3d 1133, 1136-38 (9th Cir. 2000); *Magana-Pizano,* 200 F.3d 603, 609 (9th Cir. 1999). See also, *Barapind v. Reno,* 2000 WL 1210050, at *8 (9th Cir., August 28, 2000). The Ninth Circuit has further clarified that "[a] direct corollary to our holding that [the amendments to the INA] do[ ] not repeal the availability of habeas relief is that that provision does not 'modify or amend' the scope of our habeas review." *Barapind,* 2000 WL 1210050, at *8 (quoting *Flores-Miramontes,* 212 F.3d at 1138, n. 6). Having

concluded that this Court has subject matter jurisdiction over Petitioner's § 2241 habeas petition, the Court will consider Petitioner's claims.

ANALYSIS

I. Whether AEDPA § 440(d) applied to Petitioner

Petitioner claims that the Immigration Judge and the BIA improperly applied AEDPA § 440(d) to deny his motion for an INA § 212(c) waiver of deportation because his removal proceedings commenced upon the service of the Order to Show Cause prior to the enactment of the ADEPA. In response, Respondent asserts that AEDPA § 440(d) applies to Petitioner's deportation proceedings because those proceedings did not commence until after the AEDPA's enactment when the Order to Show Cause was filed with the Immigration Court.

Petitioner and Respondent agree that under Ninth Circuit law, AEDPA § 440(d) does not apply retroactively to deportation proceedings pending at the time of the AEDPA's enactment on April 24, 1996. See, *Magana-Pizano v. INS,* 200 F.3d 603, 610 (9th Cir. 1999) (holding that AEDPA § 440(d) does not apply to deportation cases pending on the date the AEDPA became law, April 24, 1996.) Thus, the critical inquiry is whether Petitioner's deportation proceedings commenced on the date the INS served the Order to Show Cause or on the date the INS filed that order with the immigration court.

Respondent asserts that deportation proceedings did not commence until December 16, 1996 when the INS filed the charging document[9] with the immigration court pursuant to 8 C.F.R. § 3.14(a) and 8 C.F.R. § 242.1(a).[10] Petitioner, however, maintains that deportation proceedings commenced when the Order to Show Cause was issued and served on Petitioner because at that point, he was subject to the authority of the INS and possible removal. Petitioner notes that the Order to Show Cause advised him of his rights, the nature of the proceedings, the legal authority under which the proceedings were conducted, his right to counsel, the allegations against him and the relevant statutory provisions, and the consequences of his failure to appear at the deportation proceeding. (Petitioner's Exh. A) The Order to Show Cause further advised Petitioner that "the copy of this Order to Show Cause served upon you is evidence of your alien registration while you are under deportation proceedings." (*Id*)

To date, the Ninth Circuit has not addressed whether, for purposes of applying the 1996 amendments to the INA, deportation proceedings commence on the date on which the charging document is served upon the alien or upon the date the charging document is filed with the

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[9] The IIRIRA replaced the "order to show cause" with the "notice to appear" as the charging document for removal proceedings. These documents serve the same purpose of notifying an alien of the commencement of removal proceedings and the basis for removal. See, 8 U.S.C. § 1229b; 8 C.F.R. § 3.13 (1999).

[10] "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Office of the Immigration Judge by the Service." 8 C.F.R. § 3.14(a).

immigration court.[11] In fact, the First and Eleventh Circuits[12] are the only two circuit courts which have

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[11] Respondent contends that the Ninth Circuit has held that deportation proceedings commence on the filing of the Order to Show Cause. In support of that claim, Respondent cites *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549 (9th Cir. 1990). *Orantes,* however, was decided before the AEDPA was enacted and did not address the issue before this court. Rather the *Orantes* court merely stated that "the deportability of an alien is commenced by an immigration official who issues and files an order to show cause with the Office of the Immigration Judge." *Id.* at 554. The date upon which deportation proceedings commenced was not at issue in *Orantes,* rather, the Court was merely reciting the relevant INS regulations without analysis. Thus, *Orantes* is not controlling.

[12] The Seventh Circuit recently addressed a similar issue, the commencement of exclusion proceedings for purposes of determining the application of the IIRIRA. *Morales-Ramirez v. Reno,* 200 F.3d 977 (7th Cir. 2000). In *Morales,* the Seventh Circuit held that exclusion proceedings did not commence until the INS filed the charging document with the Immigration Court after the IIRIRA's effective date, therefore petitioner was not eligible for a § 212 waiver. 200 F.3d 977. In so holding, the Seventh Circuit declined to follow the First and Eleventh Circuit's which held, that for purposes of applying the AEDPA, deportation proceedings commence on the service of the Order to Show Cause. *Wallace,* 194 F.3d at 287; *Bustamante,* 201 F.3d at 1309. In declining to following [sic] the First and Eleventh Circuits, the Seventh Circuit explained that those circuits decided not to apply § 440(d) retroactively based on the aliens' reasonable reliance and expectations. The *Morales* court explained that it had reached the opposite conclusion with respect to the retroactivity of § 44-(d) to cases pending when the AEDPA was enacted. 209 F.3d at 982. Contrary to the Seventh Circuit, the Ninth Circuit has held that the AEDPA does not apply retroactively to deportation proceedings pending on the date of the AEDPA's enactment. *Magana-Pizano v. INS,* 200 F.3d 603 (9th Cir. 1999). Thus, the Court does not find the reasoning of the *Morales* court persuasive first because that case involved exclusion proceedings and second because it is based on the Seventh Circuit's holding that the AEDPA applies retroactively to cases pending on the date of the AEDPA's enactment.

addressed this precise issue. See, *Bustamante v. Reno,* 201 F.3d 1303, 1304 (11th Cir. 2000) (holding that removal proceedings commence when the INS serves an order to show cause and has lodged a warrant of detainer against an alien); *Wallace v. Reno,* 194 F.3d 279, 287 (1st Cir. 1999) (holding that deportation proceedings commence when an order to show cause is served on an alien.)

In *Wallace,* the First Circuit considered whether § 440(d) precludes § 212(c) relief to an alien served with an Order to Show Cause prior to the AEDPA's enactment. 194 F.3d 279. Similar to respondent in this matter, in *Wallace* the government argued that based on INS regulations, deportation proceedings do not commence until the filing of the charging document with the immigration court. 194 F.3d at 287. The *Wallace* court rejected the government's argument reasoning that:

> In this case, we are not concerned with the INS's internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This question turns on considerations unrelated to the purpose of the INS regulations – primarily . . . with the evil Congress sought to prevent and the realities of reasonable reliance or settled expectations on the part of litigants. From this standpoint, we think that when an order to show cause is served on the alien, the deportation process has effectively begun and expectations properly form, even if there is no actual reliance.

Wallace, 194 F.3d at 287.

The Eleventh Circuit followed this decision in *Bustamante* in holding that deportation proceedings commerce when the Order to Show cause has been served and a

warrant of detainer lodged. 201 F.3d at 1309-1310. The *Bustamante* court did not need to decide whether service of the Order to Show Cause was sufficient because, unlike *Wallace,* a warrant of detainer had been lodged against petitioner at the time the Order to Show Cause was served. *Id.* at 1309.

Similar to *Bustamante,* in this case a warrant of detainer had been lodged against Petitioner at the time the Order to Show Cause was served. Thus, this Court need not decide whether service of the Order to Show Cause alone was sufficient to commence deportation proceedings. Finding the reasoning of the Eleventh and First Circuits persuasive, this court will join these circuits in holding that for purposes of applying the 1996 amendments to the INA, deportation proceedings commence when and [sic] Order to Show Cause has been served and a warrant of detainer lodged. See, *Attwood v. Reno,* 2000 WL 900499 (D.Mass. June 16, 2000) (holding that petitioner's deportation proceedings commenced on April 18, 1996 when the INS issued the Order to Show Cause even though that order was not served on petitioner until June 6, 1996); *Sciglitano v. Holmes,* 2000 WL 675696 (E.D.Pa. May 23, 2000) (holding that service of Order to Show Cause commenced deportation proceedings.); *Mercado-Amador v. Reno,* 47 F.Supp.2d 1219, 1224 (holding that deportation proceedings commenced upon issuance of Order to Show Cause). See also, *Ramos-Birueta v. INS,* 2000 WL 1359593 (9th Cir., August 11, 2000) (unpublished) (noting, without analysis, that petitioner "was placed in deportation proceedings by issuance of an Order to Show Cause on January 20, 1994" and holding that because this pre-dated the AEDPA, § 440 did not apply.) "To conclude otherwise risks undermining the reasonable

expectations of an alien, it also ignores the INS' power over an alien once it issues the order to show cause. As soon as the INS issued the order to show cause, it has the authority to arrest [Petitioner] . . . As soon as the warrant of detainer was lodged against [Petitioner], his release from custody was problematic absent further proceedings." *Bustamante,* 201 F.3d at 1309-10.

As on April 22, 1996, Petitioner was subject to the INS' authority and faced deportation proceedings. Significantly, at the time the warrant of detainer was lodged and the Order to Show Cause served, Petitioner was eligible for consideration of an INA § 212(c) discretionary waiver from deportation. See, 201 F.3d at 1310.

In conclusion, Petitioner's deportation proceedings commenced on April 22, 1996 when a warrant of detainer had been lodged and an Order to Show Cause served. As such, Petitioner's case was pending as on April 22, 1996, prior to the enactment of the AEDPA. Because the 1996 amendments to the INA do no [sic] apply retroactively, the INS must consider the merits of Petitioner's application for § 212(c) relief. Therefore, the undersigned recommends that: (1) Petitioner's petition for writ of habeas corpus be granted; (2) Respondent reopen Petitioner's case and consider his claim for § 212(c) relief on the merits; and (3) Respondent continue to be enjoined from deporting Petitioner until after Petitioner is provided the opportunity to exhaust his claim for § 212(c) relief.

II. Equal Protection Claim

In his second claim for relief, Petitioner contends that the application of AEDPA § 440(d) to him violates equal protection because it discriminates between aliens in

deportation proceedings and those in exclusion proceedings.

Prior to the passage of the AEDPA and the IIRIRA, § 212(c) relief was available to aliens whether in deportation or exclusion proceedings. See, *Tapia-Acuna v. INS,* 640 F.2d 223, 225 (9th Cir. 1981) (holding that an application of § 212(c) which granted relief to aliens in exclusion but not deportation proceedings violated equal protection). On April 24, 1996, Congress amended 8 U.S.C. § 1182(c), INA § 212(c),to make discretionary relief from deportation unavailable to deportable aliens convicted of offenses covered by 8 U.S.C. § 1251(a)(2). On its face, this amendment denied § 212(c) relief to deportable aliens.

Thereafter, in September 1996, Congress enacted the IIRIRA repealing § 212(c) as amended by AEDPA § 440(d). Section 304(a)(7) of the IIRIRA consolidated deportation and exclusion proceedings into "removal" proceedings. Thus, the IIRIRA eliminated the equal protection issue by making § 212(c) relief unavailable to aliens in either deportation or exclusion proceedings. The IIRIRA amendments, however, did not take effect until April 1, 1997 and do not apply to deportation proceedings pending prior to that date. Because Petitioner's deportation proceedings were pending before April 1, 1997, the IIRIRA does not apply to him.

The Court, however, need not reach the equal protection issue because the undersigned has found that § 440(d) does not apply to Petitioner whose deportation proceedings commenced before the April 24, 1996 enactment of the AEDPA. See, Section I, *supra.*

III. Mandatory Detention

Finally, Petitioner claims that his continued detention under INA section 236(c), 8 U.S.C. § 1226(c) violates due process. Respondents assert that Petitioner is not detained under § 236(c), but rather pursuant to INA § 241, 8 U.S.C. § 1231(a) on the ground that his order of deportation is administratively final.

A. Whether Petitioner is Detained Pursuant to INA § 241 or INA § 236

As set forth above, the parties disagree as to whether Petitioner is detained pursuant to INA § 241 or § 236. The court must address this issue as a threshold matter before addressing whether detention Petitioner's under § 236 violates the Due Process Clause.

Section 241 of the INA requires detention of an alien during a 90-day period in which to effect the alien's removal.[13] 8 U.S.C. § 1231(a)(1)(A). The 90 days commences on the latest of the following: the "date the order of removal becomes administratively final" or "[i]f the removal order is judicially reviewed and if a court orders a stay of removal of the alien, the date of the court's final order." 8 U.S.C. § 1231(a)(1)(B)(I) and (ii). If not removed within 90 days, the alien becomes subject to supervision. 8 U.S.C. § 12319(a)(1)(A) and (3).

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[13] The amendments to the INA consolidated exclusion and deportation proceedings into one procedure for "removal." 8 U.S.C. § 1229a(a)(1).

Section 236 of the INA provides that the "Attorney General shall take into custody any alien who is deportable by reason of having committed any offense covered in section . . . 1227(a)(2)(A)(iii)," pending a decision whether he is to be removed. 8 U.S.C. § 1226(c).

Respondent maintains that § 236 applies prior to the issuance of a deportation order and that § 241 applies post issuance. Thus, Respondent asserts that because an order of deportation has been issued, Petitioner is detained pursuant to § 241.

"A § 212(c) hearing to which [the undersigned has determined] Petitioner is entitled, is successful, would void the order [of deportation]." *Rogowski v. Reno,* 94 F.Supp.2d 177, 182 (D.Conn. 1999). Additionally, on June 14, 2000, the District Court granted Petitioner's motion for preliminary injunction enjoining Respondent from executing an order of deportation against Petitioner or otherwise placing him beyond the Court's jurisdiction until a final judgment is entered in this matter. (document #22) Thus, the order of deportation is currently stayed. Thus, reading § 241 and § 236 together, § 241 does not apply to Petitioner's current detention.

As long as Petitioner can seek judicial review of the BIA's decision, the BIA order is not final. Thus, in view of the current posture of this case, Petitioner is detained pursuant to § 236. The Court, therefore, will address the propriety of his detention under that section.

B. Constitutionality of Mandatory Detention Pursuant to INA § 236

In addressing Petitioner's claim that his mandatory detention under § 236 violates due process, the court will first address the background of detention of aliens.

1. Detention of Aliens

The Immigration and Nationality Act of 1952 (the "Act" or "INA"), revised previous immigration laws. The Act contained provisions regulating criminal aliens. An alien was subject to deportation if convicted of a "crime involving moral turpitude" and if the crime was committed within five years after entry into the Unites States. 8 U.S.C. § 1251(a)(4)(A); *Martinez v. Greene,* 28 F.Supp.2d at 1279. An alien convicted of violating drug or firearm laws was also deportable. 8 U.S.C. § 156; *Martinez v. Greene,* 28 F.Supp.2d at 1279.

In 1988, Congress passed an omnibus drug enforcement bill, the Anti-Drug Abuse Act of 1988 ("ADAA"), which included provisions, deemed amendments to the Act, relating to criminal aliens. These provisions established a new category of deportable alien, the "aggravated felon." The ADAA defined aggravated felonies as murder, drug trafficking crimes, or illicit trafficking in firearms or destructive devices, including any attempt or conspiracy to commit such acts in the United States. ADAA § 7342, amending the Act § 101(a), 8 U.S.C. § 1251(a) (1982); *Martinez v. Greene,* 28 F.Supp.2d at 1279. Furthermore, the ADAA § 7343(a), the Act § 242(a)(2) required the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of the alien's

sentence and barred the Attorney General from releasing the alien. *Id.*; *Martinez v. Greene,* 28 F.Supp.2d at 1279.

The majority of courts which have considered this mandatory detention provision declared it unconstitutional in violation of Due Process. *Id.* Thus, Congress subsequently amended the statute in 1990 and 1991 to permit release of those aggravated felons who were lawfully admitted to the United States and who could demonstrate that they were not a threat to the community and were likely to appear for their hearings. *Id.* at 1279-80.

Thereafter, in 1996, Congress enacted the AEDPA, which established, for aggravated felons and other noncitizens with criminal convictions, automatic mandatory detention without eligibility to apply for bond. INA § 242(a)(2), 8 U.S.C. § 1252. The AEDPA was replaced with the IIRIRA, which included "Transition Period Custody Rules." These rules provided bond hearings to aliens with criminal convictions at which they could seek to demonstrate legal entry into the United States and to establish that the alien did not present a substantial risk of flight or threat to persons or property. If the alien met these criteria, the Immigration Court could, as a matter of discretion, set bond pending the final administrative action in the case. *Martinez,* 28 F.Supp.2d at 1280.

The IIRIRA's Transition Period custody Rules expired on October 9, 1998 and INA § 236(c), 8 U.S.C. § 1226(c) became effective. *Martinez,* 28 F.Supp.2d at 1280. Section 236(c) provides:

Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who –

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(I) of this title on the basis of an offense for which the alien has been sentence (sic) to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(A)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a

> witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

INA § 236(c), 8 U.S.C. § 1226(c). Petitioner challenges the constitutionality of this provision.

2. Analysis

Petitioner claims that by denying him an individualized bond hearing, § 236(c) deprives him of his right to due process of law guaranteed by the Fifth Amendment of the United States Constitution. The issue before this Court is whether the mandatory detention provision contained in § 236(c) is unconstitutional, at least as applied to Petitioner.

a. Scope of judicial review

This court has only limited authority to review immigration legislation. The Supreme Court has emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission and expulsion of aliens. *Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473 (1977). The Court has long recognized "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" *Shaughnessy v. Mezei,* 345 U.S. 206, 210, 73 S.Ct. 625

(1953). "[T]he power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21, 96 S.Ct. 1895 (1976).

b. Standard of review

"It is well-established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores,* 507 U.S. 292, 306, 113 S.Ct. 1439, 1449 (1993). Congress has broad powers over immigration and may make rules "that would be unacceptable if applied to citizens." *Mathews v. Diaz,* 426 U.S. 67, 79-80, 96 S.Ct. 1883 (1976).

There is, however, a distinction between Congress' power over substantive immigration laws and its power to enact rules implementing or enforcing those laws:

> Congress' broad authority over immigration has traditionally extended to decisions about what classes of aliens are admissible and deportable and under what circumstances. See, e.g., *Fiallo,* 430 U.S. at 792, 97 S.Ct. at 473 (Congress has plenary power over *admission* of aliens). Thus, it has been said that "the power to *expel or exclude* aliens . . . [is] largely immune from judicial control," *Shaughnessy v. U.S. ex rel. Mezei,* 345 U.S. 206, 210, 73 S.Ct. 625, 97 L.Ed. 956 (1953) (emphasis added); that Congress has "exceptionally broad power to determine which classes of aliens may lawfully *enter* the country," *Fiallo,* 430 U.S. at 794, 97 S.Ct. 1473 (emphasis added); and that Congress has "a sovereign right to determine what noncitizens shall be permitted to *remain within* our borders." *Carlson v. Landon,* 342 U.S.

> 524, 534, 72 S.Ct. 525, 96 L.Ed. 547 (1952) (emphasis added).

Danh v. Demore, 59 F.Supp.2d at 999.

This case presents a different issue: whether Congress' power to detain aliens pending deportation proceedings without any possibility of release on bond is insulated from meaningful judicial review. *Id.*

A federal statute is presumed constitutional unless shown otherwise. *Szeto v. Reno,* 2000 WL 630869, *2 (N.D. Cal. May 5, 2000); *Danh v. Demore,* 59 F.Supp.2d 994, 997 (N.D. Cal. 1999). To prevail on a facial challenge to the constitutionality of a statute, the petitioner "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095 (1987); *Danh v. Demore,* 59 F.Supp.2d at 997-98. To prevail on an "as applied" challenge, the petitioner must only show that the statute, as applied to him, is invalid. *Danh,* 59 F.Supp. at 998.

The substantive component of the Fifth and Fourteenth Amendments' guarantee of due process of law "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 302-03, 113 S.Ct. 1439, 1447 (1993) (emphasis in original); *see, United States v. Salerno,* 481 U.S. 1301, 746, 107 S.Ct. 2095, 2101 (1987).

Reno v. Flores involved the constitutionality of the release procedures accorded juvenile aliens. The Court determined that the "freedom from physical restraint . . . in the sense of shackles, chains, or barred cells", was not

at issue, *id.* at 302, 113 S.Ct. at 1447, and that because "juveniles, unlike adults, are always in some form of custody", the "right" asserted by Flores could not be considered "fundamental." *Id.* at 302-03, 113 S.Ct. at 1447.

Unlike the issue in *Flores,* freedom from physical restraint is precisely the issue in this case. Freedom from bodily restraint is at the core of the liberty which the Due Process Clause protects. *Foucha v. Louisiana,* 504 U.S. 71, 80, 12 S.Ct. 1780, 1785 (1992). "The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." *Reno v. Flores,* 507 U.S. at 316, 113 S.Ct. at 1454 (O'Connor, J., concurring). The *Salerno* standard applies here. Many, if not most, of the courts that have addressed this issue, agree. *See, e.g., Szeto v. Reno,* 2000 WL 630869 at *6; *Bouayad v. Holmes,* 74 F.Supp.2d 471, 474 (E.D.Pa. 1999); *Danh v. Demore,* 59 F.Sup.2d at 1000; *Van Eeton v. Beebe,* 49 F.Supp.2d 1186, 1189 (D. Or. 1999); *Diaz-Zaldierna v. Fasano,* 43 F.Supp.2d 1114, 1119 (S.D. Cal. 1999); *Martinez v. Greene,* 28 F.Supp. at 1281; *but see, Alikhani v. Fasano,* 70 F.Supp.2d 1124, 1134 (S.D. Cal. 1999).

c. Substantive due process

District courts are split over whether the mandatory detention provision of § 236(c) violates an alien's due process rights. *See, e.g., Greene v. Vo,* 2000 WL 1175095 (D. Co. Aug. 18, 2000 (section 236(c) facially violates substantive due process); *Szeto v. Reno,* 2000 WL 630869 (section 236(c) violates substantive due process as applied to petitioner); *Bouayad v. Holmes,* 74 F.Supp.2d at 476 (same); *Danh v. Demore,* 59 F.Supp.2d at 1001 (same); *Van Eeton v. Beebe,* 49 F.Supp.2d at 1189-90 (same); *Martinez*

v. Greene, 28 F.Supp.2d at 1282 (section 236(c) facially violates substantive due process); *but see, Lezcano v. Reno,* 2000 WL 1175564 (N.D. Cal. Aug. 4, 2000) (petitioner failed to show that § 236(c) is unconstitutional on its face or as applied); *Alikhani v. Fasano,* 70 F.Supp. at 1134 (same); *Diaz-Zaldierna v. Fasano,* 43 F.Supp.2d at 1120 (same).

The only circuit court that has addressed the constitutionality of § 236(c) is the Seventh, which in *Parra v. Perryman,* 172 F.3d 954, 958 (1999), upheld the statute on the grounds that a fundamental liberty interest was not implicated. But *Parra* is distinguishable. In *Parra*, the petitioner conceded deportability, so his "legal right to remain in the United States [had] come to an end." *Id.* at 958. The court opined that "[a]n alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately. He has the keys in his pocket." *Id.*

By contrast, Petitioner contests his deportability and does not assert an absolute right to be released pending deportation proceedings. Parra sought release so that he could spend his remaining time in the Untied States at home with his family. *Parra v. Perryman,* 172 F.3d at 956. Petitioner, however, seeks "only the modest right to an individualized bond determination regarding whether release pending deportation is appropriate." *Danh v. Demore,* 59 F.Supp.2d at 1003.

Even if mandatory detention can be shown to protect the public from criminal aliens and to ensure that the aliens are readily available for removal, these objectives can be satisfied by conducting individual hearings:

> While the risk of flight by aliens may be significant, the public can still be protected by a careful evaluation of an individual alien's case which should result in the detention of those who are likely to flee. The need for a blanket rule of detention of certain aliens rather an (sic) individual evaluation is undermined by 8 U.S.C. § 1231(a)(3), (60, which provide that ninety days after an order of removal becomes final, an alien who has not yet been removed from the country may be released from detention in the discretion of the Attorney General. *See Martinez,* 28 F.Supp.2d at 1283-84. Aliens who are under a final order of removal surely present a greater risk of flight or danger to the community, yet their continued detention is not mandated. Given that a hearing within a reasonable time period after removal proceedings are commenced will meet the government's concerns regarding protection of the community and lessening the risk of flight, delaying a hearing until *after* the alien has been ordered removed is excessive.

Bouayad v. Holmes, 74 F.Supp.2d at 475.

The undersigned, like the court in *Danh,* declines to follow *Parra,* and recommends that this court join those courts finding that the mandatory detention provisions are unconstitutional in violation of the Due Process Clause.

d. Procedural due process

Having concluded that Petitioner's substantive due process rights have been violated, it is unnecessary to determine whether his procedural due process rights have also been violated. Only when a restriction on liberty survives substantive due process scrutiny does the further

question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration. *Danh v. Demore,* 59 F.Supp.2d at 1004. The court, however, will address the issue briefly.

To determine whether a statute or governmental conduct satisfies procedural due process, courts must generally consider the following factors: (1) the private interest affected by the official action; (2) the risk that current procedures will cause an erroneous deprivation of the private interest, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedures would entrail. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893 (1976); *Danh v. Demore,* 59 F.Supp.2d at 1004; *Van Eeton v. Beebe,* 49 F.Supp.2d at 1190; *Martinez v. Greene,* 28 F.Supp.2d at 1282-83.

Here, the private interest affected is great – the right to be free of indefinite and possible long-term detention pending a deportability determination. *Van Eeton v. Beebe,* 49 F.Supp.2d at 1190; *Martinez v. Greene,* 28 F.Supp.2d at 1283. The risk of erroneous deprivation of liberty is substantial because § 236(c) provides no procedure at all for determining if an individual warrants release on bond. *Id.* Finally, the burden on the government of holding individual bond hearings is minimal because the alien is already entitled to a hearing to determine if he is an "aggravated felon" under the IIRIRA. "If familiar traditional bail procedural requirements are imposed, the attendant fiscal and administrative burdens would be minimal." *Martinez v. Greene,* 28 F.Supp.2d at 1283.

"A fundamental requirement of due process is 'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187 (1965); *Danh v. Demore,* 59 F.Supp.2d at 1004. The undersigned concludes that "due process requires an individualized consideration of whether each alien detained pursuant to § 1226(c)(1) represents a flight risk and a threat to the community's safety." *Van Eeton v. Beebe,* 49 F.Supp.2d at 1190; *Martinez v. Greene,* 28 F.Supp.2d at 1283.

CONCLUSION

In conclusion, the Court finds that AEDPA § 440(d) does not apply to Petitioner's case where his deportation proceedings commenced prior to the AEDPA's enactment. In view of that holding, the Court declines to address Petition's Equal Protection claim. Finally, the Court finds that Petitioner's detention pursuant to § 236 violates due process

In accordance wit the foregoing,

IT IS HEREBY RECOMMENDED that: (1) Petitioner's petition for writ of habeas corpus (document #1) be **GRANTED**; (2) Respondent reopen Petitioner's case and consider his claim for § 212(c) relief on the merits; and (3) Respondent continue to be enjoined from deporting Petitioner, if at all, until after Petitioner is provided the opportunity to exhaust his claim for § 212(c) relief.

IT IS FURTHER RECOMMENDED the Respondent's Motion to Dismiss (document #18) be **STRICKEN**.

IT IS FURTHER RECOMMENDED that Respondent be ordered to release Petitioner unless within twenty days

of the date on which the District Court enters a judgment in this matter he is afforded an individualized bond hearing before an Immigration Judge.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See,* 28 U.S.C. § 636(b)(1) and Rules 72, 6(a) and 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Dated this 11th day of October, 2000.

/s/ Lawrence O. Anderson
Lawrence O. Anderson
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Hugo Armendariz-Montoya, Petitioner, vs. Roseanne C. Sonchik, District Director, U.S. Immigration and Naturalization Service, Respondent.	00-CIV-0422-PHX-RGS **ORDER** (Filed Jan. 30, 2001)

On March 9, 2000 Petitioner filed a Petition for Writ of Habeas Corpus. On May 5, 2000 Respondent filed a Motion to Dismiss this case for failure to state a claim upon which relief could be granted. On October 13, 2000 the assigned Magistrate Judge issued a Report and Recommendation. Thereafter, on October 27, 2000 Respondent filed Objections to the Report and Recommendation. On November 6, 2000 Petitioner filed a response to the Respondent's objections.

The Court has reviewed the Report and Recommendation of the Magistrate Judge and has considered the pleadings arguments and authorities presented by the parties.

Based upon the foregoing;

IT IS ORDERED adopting, in part, the Report and Recommendation of the Magistrate Judge (Doc. # 15).

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss (document #18) be stricken.

IT IS FURTHER ORDERED granting the following relief sought by Petitioner; (1) Respondent shall reopen Petitioner's case and consider his claim for §212(c) relief on the merits; and (2) Respondent shall continue to be enjoined from deporting Petitioner, if at all, until after Petitioner is provided the opportunity to exhaust his claim for §212(c) relief.

FURTHER ORDERED, in view of the Petitioner having been released, said party's detention claim is denied for mootness.

DATED this 28th day of January, 2001.

/s/ Roger G. Strand
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A35 891 876 – Florence Date: Oct. 23, 1997.

In re: HUGO *ARMENDARIZ*-MONTOYA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Vikram K. Badrinath, Esquire
Stender & Larkin
630 South Main Avenue
Tucson, Arizona 85701

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

You have argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g.,*

Matter of Fuentes-Campos, Interim Decision 3318 (BIA 1997); *Matter of C.*, 20 I&N Dec. 529 (BIA 1992).

You have also filed a motion to admit new evidence on appeal. The evidence you seek to have admitted goes to the discretionary factors pertinent to section 212(c) relief. However, as you are statutorily ineligible for section 212(c) relief, it would serve no purpose to admit evidence concerning your equities. Thus, the motion is denied.

Accordingly, the appeal is dismissed.

/s/ Fred W. Vacca
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
230 NORTH FIRST AVE RM 3114
PHOENIX, AZ 85025

In the Matter of:
*S-ARMENDARIZ-MONTOYA. HUGO HORCIO

Case No.: A35-891-876

Docket: ARIZONA DOC – FLORENCE

RESPONDENT:

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Apr 16, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

(X) The respondent was ordered deported to Mexico.

( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to or in the alternative to

( ) Respondent's application for voluntary departure was granted until , with an alternate order of deportation to or

( ) Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

( ) Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

( ) Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

( ) Respondent's application for waiver under Section ___ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

( ) Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

( ) Proceedings were terminated.

( ) The application for adjustment of status under Section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

( ) Respondent's status was rescinded under Section 248.

( ) Other _____.

( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Date: Apr 16, 1997

/s/ Scott M. Jefferies
SCOTT M. JEFFERIES
Immigration Judge

Appeal: WAIVED (Alien/INS/Both)
Appeal Due by: 5-11-97
ES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUGO ARMENDARIZ-MONTOYA, Petitioner-Appellee, v. ROSEANNE C. SONCHIK, District Director, Immigration and Naturalization Service, Respondent-Appellant.	No. 01-16029 D.C. No. CV-00-00422-RGS ORDER (Filed Nov. 26, 2002)

BEFORE: O'SCANNLAIN and TALLMAN, Circuit Judges, and KING*,

District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judges O'Scannlain and Tallman voted to deny the petition for rehearing en banc, and Judge King so recommended.

The full court was advised of the Suggestion for Rehearing En Banc. A judge of this court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judge in favor of en banc consideration.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The Petition and the Suggestion are thus DENIED.

The mandate shall issue forthwith.

1. Section 1182(c) of Title 8 of the United States Code, as in effect before April 24, 1996 provides, in relevant part:

§ 1182(c) Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

* * *

2. Section 1182(c) of Title 8 of the United States Code, as amended effective April 24, 1996, now provides (emphasis added):

§ 1182(c) Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply

to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years. *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

* * *

3. Section 1229b(a) of Title 8 of the United States Code, as in effect beginning April 1, 1997, provides:

§ 12296b Cancellation of Removal; Adjustment of Status

(a) Cancellation of Removal for Certain Permanent Residents. –

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * *

4. Section 1252(g) of Title 8 of the United States Code, as in effect beginning April 1, 1997, provides, in relevant part:

§ 1252 Judicial Review of Orders of Removal

(g) Exclusive Jurisdiction. –

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the attorney General to commence proceedings, adjudicates cases, or executive removal orders against any alien under this Act.

* * *

5. Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276-77 (enacted Apr. 24, 1996), states:

(d) CLASSES OF EXCLUDABLE ALIENS –

Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –

(1) by striking "The first sentence of this" and inserting "This"; and (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), B), (C), or (D), of any offense covered by section 241(a)(2)(A)(ii) for which both predicate offense are covered by section 241(a)(2)(A)(i)."

* * *

6. Section 309(c) of the illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996), provides in relevant part:

§ 309. Effective Dates; Transition.

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

No. 02-1273

In the Supreme Court of the United States

HUGO ARMENDARIZ-MONTOYA, PETITIONER

v.

PATRICIA SCHMIDT,
INTERIM DISTRICT DIRECTOR, BUREAU OF CUSTOMS
AND IMMIGRATION ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which rendered aggravated felons such as petitioner statutorily ineligible for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994), is inapplicable to petitioner's case because, although charges were not filed against petitioner until after the enactment of AEDPA, an order to show cause was served on him prior to that date.

2. Whether Section 440(d) is inapplicable to petitioner's case under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), even though he was convicted of an aggravated felony after a jury trial.

3. If AEDPA Section 440(d) applies to petitioner's case, whether its application violates constitutional equal protection guarantees.

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In the Supreme Court of the United States

No. 02-1273

HUGO ARMENDARIZ-MONTOYA, PETITIONER

v.

PATRICIA SCHMIDT,
INTERIM DISTRICT DIRECTOR, BUREAU OF CUSTOMS
AND IMMIGRATION ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 291 F.3d 1116. The order of the district court (Pet. App. 44a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2002. A petition for rehearing was denied on November 26, 2002 (Pet. App. 50a-51a). On February 22, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 22, 2003. The petition for a writ of certiorari was filed on February 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is a native and citizen of Mexico. Pet. App. 16a. In 1972, he entered the United States unlawfully and without inspection. *Id.* at 2a. Petitioner became a lawful permanent resident of the United States in 1978. *Ibid.* In September 1995, petitioner was convicted after a jury trial in Arizona state court of possessing cocaine with intent to distribute it. He was sentenced to a term of imprisonment of five years and eight months. *Ibid.*

On April 22, 1996, based on petitioner's conviction, the Immigration and Naturalization Service (INS) served on petitioner an order to show cause, charging him with being deportable as an alien convicted of an aggravated felony and a controlled substance violation. Pet. App. 3a; see 8 U.S.C. 1251(a)(2)(A)(iii) and (a)(2)(B)(i) (1994). The INS had earlier lodged a detainer against petitioner with the Arizona Department of Corrections. Pet. App. 3a. On December 19, 1996, the INS filed the order to show cause with the immigration court. *Ibid.*[1]

b. In his deportation proceeding before an immigration judge, petitioner conceded that he is deportable from the United States but applied for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994). Pet. App. 3a. Before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the Attorney General was author-

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[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. 251(2)).

ized under former Section 1182(c) to provide discretionary relief from deportation to aliens lawfully admitted for permanent residence.[2] To be eligible for such relief, the alien had to show that he had maintained a lawful, unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that the Attorney General's discretionary authority "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

On April 24, 1996, AEDPA became law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (recodified as 8 U.S.C. 1227(a)(2)(A)(iii)); see also 8 U.S.C. 1101(a)(43) (defining "aggravated felony").

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[2] Former Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms authorized only the admission of certain lawful permanent resident aliens who otherwise would have been excludable upon returning to the United States, deportable aliens (who had achieved entry into the United States) were allowed to apply for discretionary relief from deportation under that provision. See Pet. App. 11a-12a.

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Section 304 of IIRIRA, 110 Stat. 3009-587 to 3009-597, repealed 8 U.S.C. 1182(c) (1994) and replaced it with current 8 U.S.C. 1229b, which makes permanent resident aliens who have been convicted of an aggravated felony categorically ineligible for discretionary relief from removal. New Section 1229b generally does not apply to immigration proceedings commenced before April 1, 1997. See IIRIRA § 309(a) and (c), reproduced in 8 U.S.C. 1101 note.[3]

c. In April 1997, the immigration judge in petitioner's case determined that AEDPA Section 440(d) applies to petitioner and, on that basis, denied his application for a waiver of deportation under 8 U.S.C. 1182(c) and ordered him removed. Pet. App. 3a, 48a-49a. In October 1997, the Board of Immigration Appeals (BIA) affirmed. It likewise determined that petitioner is statutorily ineligible under AEDPA Section 440(d) for relief under 8 U.S.C. 1182(c) (1994). The BIA rejected petitioner's equal protection challenge to

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[3] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were deportable. See 8 U.S.C. 1251 (1994). IIRIRA replaced the category of "excludable" aliens with the new category of "inadmissible" aliens, consisting of aliens who are not eligible for admission into the United States. See 8 U.S.C. 1182. In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-597, Congress instituted a new form of proceeding, known as "removal," that applies to inadmissible aliens as well as deportable aliens. See 8 U.S.C. 1229, 1229a.

Section 440(d), stating that it has no power to hold an Act of Congress unconstitutional. Pet. App. 46a-47a.

The Court of Appeals for the Ninth Circuit dismissed petitioner's ensuing petition for review because it lacked jurisdiction over the case. Pet. App. 4a; see IIRIRA § 309(c)(4)(G), reproduced in 8 U.S.C. 1101 note; see also 8 U.S.C. 1252(a)(2)(C).

2. In March 2000, petitioner filed a habeas corpus petition in the United States District Court for the District of Arizona pursuant to 28 U.S.C. 2241. Pet. App. 19a. Petitioner contended that AEDPA Section 440(d) does not apply to deportation proceedings that were pending at the time of AEDPA's enactment and that his proceeding commenced before AEDPA's enactment, when he was served with the INS's order to show cause. *Id.* at 23a. Petitioner also argued that, if AEDPA Section 440(d) does apply to his case, then that application violates the Constitution's due process and equal protection guarantees.[4]

The case was referred to a magistrate judge who determined that petitioner's deportation proceeding commenced on April 22, 1996 (two days before AEDPA's enactment), when the INS served its order to show cause. The magistrate judge rejected the INS's argument that the proceeding commenced on December 16, 1996, when the INS filed the order to show cause with the immigration court. Because the Ninth Circuit had ruled that AEDPA Section 440(d) does not apply to deportation proceedings pending at the time of AEDPA's enactment, see *Magana-Pizano* v. *INS*, 200

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[4] Petitioner also argued that his detention during deportation proceedings, pursuant to 8 U.S.C. 1226(c), was unconstitutional. See Pet. App. 20a. The district court dismissed that claim as moot, *id.* at 45a, and the dismissal was not challenged on appeal.

F.3d 603, 610-611 (1999), the magistrate judge concluded that AEDPA's amendment to 8 U.S.C. 1182(c) (1994) does not apply to petitioner. Pet. App. 23a-28a. The magistrate judge therefore did not address petitioner's constitutional challenges to AEDPA. *Id.* at 28a-29a.

The district court adopted the magistrate judge's recommendation in relevant part, directed that petitioner's case be reopened for consideration of his application for a discretionary waiver of deportation under former Section 1182(c), and enjoined the INS from deporting petitioner during the consideration of petitioner's application for discretionary relief. Pet. App. 44a-45a.

3. The Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-14a. The court of appeals followed its earlier decision in *Cortez-Filipe* v. *INS*, 245 F.3d 1054 (2001), which held, consistent with administrative regulations, that deportation proceedings commence when the INS files a charging document with the immigration court. See Pet. App. 5a (citing 8 C.F.R. 3.14(a) (2002), 239.1(a), 240.55). The court disagreed with the First Circuit's determination in *Wallace* v. *Reno*, 194 F.3d 279 (1999), that deportation proceedings commenced for purposes of applying AEDPA Section 440(d) when the INS served on the alien an order to show cause. Pet. App. 6a-8a. The court also rejected petitioner's argument that the INS's lodging of a detainer with the Arizona Department of Corrections, prior to serving the order to show cause, established that his deportation proceeding commenced upon service of the order to show cause. The court explained that "[t]he relevant INS regulations make the filing of the [order to show cause with the immigration court], not the lodging of a detainer, the critical event." *Id.* at

8a-9a. Therefore, the court of appeals concluded that AEDPA's amendment to 8 U.S.C. 1182(c) (1994), which disqualifies petitioner from being considered for a discretionary waiver of deportation, applies to petitioner's case. Pet. App. 9a.

The court of appeals next rejected petitioner's argument that AEDPA Section 440(d) is inapplicable to his case on retroactivity grounds. Pet. App. 9a-10a. The court held, in accord with Ninth Circuit precedent, that AEDPA Section 440(d) is not impermissibly retroactive under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), when it is applied to an alien whose pre-AEDPA criminal convictions were obtained after a jury trial. Pet. App. 9a-10a. The court explained that "[u]nlike aliens who pleaded guilty" before AEDPA, to whom the eligibility-limitation of Section 440(d) may not be applied under *St. Cyr*, "aliens who elected a jury trial [on aggravated felony charges] cannot plausibly claim that they would have acted any differently if they had known about [the change of law that was made by] § 440(d)." *Id.* at 10a.

The court of appeals likewise rejected petitioner's argument that AEDPA Section 440(d) denies equal protection as applied to his case. Pet. App. 11a-14a. Again relying on Ninth Circuit precedent, the panel concluded that, although the plain language of Section 440(d) makes relief under Section 1182(c) unavailable only to deportable aggravated felons, and not to aggravated felons who were denied admission to the United States and placed in exclusion proceedings, Section 440(d) should be read to "appl[y] equally to exclusion and deportation proceedings." *Id.* at 12a. Based on that reading of Section 440(d), the court of appeals determined that Section 440(d) treats deportable aliens and excludable aliens similarly, and does not deny

deportable aliens equal protection of the laws. *Id.* at 12a-13a. The court observed that other circuits "have uniformly rejected" equal protection challenges to AEDPA Section 440(d). *Id.* at 13a.

ARGUMENT

The two principal questions presented by the petition are (1) whether the retroactivity rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), should be extended to aliens who were convicted after a jury trial before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and who would have been eligible at the time of their conviction to be considered for a waiver of deportation despite the conviction, and (2) whether the application of AEDPA Section 440(d) to such deportable aliens denies them equal protection. The decision below correctly resolved those issues and there is no conflict with any decision of this Court, nor any material disagreement among the courts of appeals. Indeed, every court of appeals that has considered the question has declined to extend *St. Cyr* to aliens who were convicted after a trial. Likewise, the courts of appeals have uniformly rejected equal protection challenges to Section 440(d) that have been brought by aliens in petitioner's situation.

This case, moreover, would be a poor vehicle for considering those possible judicial and constitutional limitations on Section 440(d)'s application. Petitioner disputes whether, by its own terms, AEDPA applies to his case. That "antecedent question" (Pet. i) about AEDPA's applicability was correctly resolved by the court of appeals, is of little continuing importance, and also does not warrant this Court's review.

1. Every court of appeals that has considered the question after *St. Cyr* has concluded that the 1996

immigration amendments do not operate in a retroactive fashion when applied to disqualify an alien such as petitioner from being considered for a waiver of deportation because of his conviction of an aggravated felony *after a trial*. See Pet. App. 9a-10a; *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003); *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), petition for cert. pending, No. 02-1344 (filed Feb. 24, 2003); *Chambers* v. *Reno*, 307 F.3d 284, 289-293 (4th Cir. 2002); see also *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001) (reaching same conclusion before *St. Cyr*).

Those uniform decisions of the courts of appeals are correct and consistent with *St. Cyr*. *St. Cyr* addressed only the situation of aliens whose criminal convictions "were obtained through plea agreements" before the 1996 immigration amendments. 533 U.S. at 326. The Court reasoned that the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that rendered waivers of deportation unavailable to aggravated felons and certain other criminal aliens, see 8 U.S.C. 1229b(a) and (b), should not be applied to that class of criminal aliens because that would "attach[] a new disabilit[y]" in respect to the pre-AEDPA plea. 533 U.S. at 321 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted). The Court emphasized that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *ibid.*, by which the defendant waives constitutionally guaranteed rights and provides a benefit to prosecutors and the criminal justice system, *id.* at 322. Furthermore, the Court concluded that "as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," including the possibility

of ineligibility for discretionary relief from deportation. *Ibid.* Indeed, the Court determined that, before 1996, "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, which "almost certainly" influenced their decision to accept a plea, *id.* at 325.

None of those considerations applies to aliens, like petitioner, who procceded to trial. Those aliens did not provide the government a *quid pro quo*, but rather asserted their constitutional right to a trial and required the government to expend prosecutorial and judicial resources to obtain a conviction. Moreover, there is no basis for supposing that aliens who *rejected* plea agreements generally were motivated by a desire to obtain immigration benefits. Aliens who proceeded to trial before the 1996 immigration amendments commonly did so *despite* the immigration laws that were in effect at the time. Often, such aliens would have risked losing immigration benefits if they rejected a plea agreement, because they might receive and serve a sentence of five years or more and thereby be rendered ineligible for relief under 8 U.S.C. 1182(c) (1994). See p. 3, *supra*; *St. Cyr*, 533 U.S. at 323 (discussing case of alien who pursued plea agreement to avoid risk of losing waiver eligibility after trial); *Dias*, 311 F.3d at 458 (alien who chose to go to trial was "not relying on immigration law as it existed at the time in making that decision").

Petitioner argues (Pet. 23) that his own choice to go to trial was affected by pre-AEDPA immigration law, because "[i]f [petitioner] had known that § 440(d) would result in his *mandatory* deportation should he *lose* at trial, he would have had a greater incentive towards accepting a plea agreement to avoid a negative impact

upon his immigration status (e.g., by accepting a plea to solicitation to sell cocaine)." Petitioner, however, does not claim that he actually rejected a plea offer, much less that any such offer would have assured his eligibility for relief under Section 1182(c) as it then read. Nor does he suggest that any significant number of aliens who were convicted after trial rejected plea offers because of the provisions of former Section 1182(c). See *Chambers*, 307 F.3d at 290 ("An alien in Chambers' position * * * does not have a reliance interest comparable to that which was at the heart of *St. Cyr.*").

Indeed, contrary to petitioner's argument (Pet. 23), petitioner could not reasonably have "believed [that] even if he went to trial and *lost*, he would *still remain eligible* for [a waiver of deportation]." The drug-trafficking crime of which petitioner was accused was punishable by a prison term of more than five years, and petitioner actually received such a term (although he did not ultimately serve that full term). See Pet. App. 2a-3a. Therefore, when petitioner went to trial he clearly put himself at risk of serving a sentence of five years or more. Serving such a sentence would have made him ineligible to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), regardless of the later immigration amendments that denied waiver-eligibility to all aggravated felons. When an alien proceeds to trial under circumstances like those of petitioner's case, it is reasonable to assume that he did so because he believed that the government could not prove its case or because he was unable to reach a plea agreement that was sufficiently favorable overall, not to preserve his eligibility for immigration relief.

2. Like petitioner's *St. Cyr* claim, his equal protection challenge to AEDPA Section 440(d) presents an

argument that the courts of appeals have uniformly rejected. By its plain terms, Section 440(d) eliminated the possibility of discretionary immigration relief for aggravated felons in deportation proceedings, but not for aggravated felons in exclusion proceedings (who, in most instances, were seeking to enter the United States from abroad). See AEDPA § 440(d), 110 Stat. 1277. Consistent with that plain language, the Board of Immigration Appeals determined in 1997 that Section 440(d)'s restriction does not apply to aggravated felons who are in exclusion proceedings. *In re Fuentes-Campos*, 21 I. & N. Dec. 905 (1997). Petitioner claims (Pet. 27-30) that Section 440(d)'s distinction between deportable aggravated felons and excludable aggravated felons denies deportable aggravated felons equal protection, in violation of the Due Process Clause of the Fifth Amendment.

Every court of appeals that has addressed whether Section 440(d) violates the constitutional equal protection guarantee as applied to a deportable alien in petitioner's situation has rejected that claim. Those courts generally have held—correctly, in our view—that Congress could rationally distinguish between deportable aggravated felons and excludable aggravated felons when tightening eligibility for discretionary relief from removal from the United States, because the more generous rule for excludable aliens encourages aggravated felons who have been sentenced to less than five years' imprisonment to leave the country voluntarily and then apply for reentry under the more generous waiver provision, rather than remaining in the United States and awaiting government-initiated deportation proceedings in which the stricter waiver rule would preclude relief. See *Asad* v. *Reno*, 242 F.3d 702, 706-707 (6th Cir. 2001); *Alfarache* v.

Cravener, 203 F.3d 381, 383 (5th Cir.) (per curiam), cert. denied, 531 U.S. 813 (2000); *Almon* v. *Reno*, 192 F.3d 28, 31-32 (1st Cir. 1999), cert. denied, 531 U.S. 830 (2000); *DeSousa* v. *Reno*, 190 F.3d 175, 184-185 (3d Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1152-1153 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000); see also *Rankine*, 319 F.3d at 103 (summarily rejecting equal protection challenge). As the Seventh Circuit explained,

> [a] rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens: it creates an incentive for deportable aliens to leave the country—which is after all the goal of deportation—without their having to be ordered to leave at the government's expense.

LaGuerre, 164 F.3d at 1041; see Pet. App. 13a.

The Ninth Circuit has taken a different approach, determining that the waiver-eligibility restriction of Section 440(d) should be construed to apply to *both* excludable and deportable aggravated felons. *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (9th Cir. 1999) (per curiam), cert. denied, 531 U.S. 864 (2000), overruled on other grounds, *United States* v. *Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc). As the Ninth Circuit made clear in this case (Pet. App. 12a-14a), however, its approach is just as fatal to petitioner's equal protection argument as the approach of the other circuits, because it sustains the application of Section 440(d) to deportable aliens like petitioner.[5]

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[5] In *Estrada-Torres*, the Ninth Circuit rejected the BIA's determination in *Fuentes-Campos* that Section 440(d) applies to

Because the courts of appeals have uniformly reached the correct result of rejecting equal protection challenges to the application of Section 440(d), petitioner's equal protection claim does not merit this Court's review.

3. The third question presented in the petition is the logically "antecedent" issue (Pet. i) whether the court of appeals was correct when it concluded (Pet. App. 4a-9a) that AEDPA Section 440(d) applies to petitioner's case because petitioner's deportation proceeding had not yet commenced when AEDPA was enacted. The presence of that threshold question about the application of AEDPA's effective date is an additional reason why this Court's review of petitioner's case is not warranted.

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deportable aliens, but not excludable aliens. See 179 F.3d at 779. In *Servin-Espinoza* v. *Ashcroft*, 309 F.3d 1193 (2002), the Ninth Circuit held that it was a denial of equal protection for an immigration judge (affirmed by the BIA), after *Fuentes-Campos* but before the *Estrada-Torres* decision in June 1999, to apply *Fuentes-Campos* to a deportable alien's application for a discretionary waiver of deportation and deny that application in light of Section 440(d). See 309 F.3d at 1198 ("In the window of time between *Fuentes-Campos* and *Estrada-Torres*, the INS in violation of our interpretation of § 440(d), systematically favored excludables over deportables."). But this case is not governed by that aspect of *Servin-Espinoza*. The immigration judge in petitioner's case issued a deportation order in April 1997, see Pet. App. 19a, which was *before* the BIA's decision in *Fuentes-Campos*. *Estrada-Torres* rejected an equal protection challenge in similar circumstances. 179 F.3d at 777-778; see *Servin-Espinoza*, 309 F.3d at 1195; see also *id.* at 1196 (relevant administrative decision for purposes of *Servin-Espinoza*'s equal protection analysis is immigration judge's deportation order, not BIA's decision on appeal). Thus, the court of appeals correctly applied circuit precedent when it held that "*Estrada-Torres* dictates that [petitioner's] equal protection claim is without merit." Pet. App. 14a.

If petitioner were to prevail on his argument that AEDPA does not apply to his case because of the timing of his deportation proceeding, then the Court would have no occasion to answer either of the first two questions stated in the petition, which involve arguments why AEDPA, if otherwise applicable to petitioner, nevertheless should be held inapplicable on retroactivity or equal protection grounds. Thus, if petitioner's argument about AEDPA's effective date were accepted, granting the petition likely would not result in any determination by this Court about the *St. Cyr* and equal protection issues.

Furthermore, the effective-date issue that petitioner raises is not independently worthy of this Court's review. The issue is one of inherently limited and diminishing importance. Petitioner accepts and relies on the court of appeals' conclusion (Pet. App. 4a-5a) that AEDPA Section 440(d) does not apply to immigration cases that were already pending before an immigration judge as of AEDPA's enactment on April 24, 1996. Petitioner's argument is that, for purposes of AEDPA, his administrative deportation proceeding commenced on April 22, 1996—two days before AEDPA's enactment—even though charges had not yet been filed in the administrative immigration court. See Pet. 15-21. Petitioner emphasizes that his effective-date argument is based specifically on AEDPA and would not apply to cases concerning the effective date of IIRIRA, which was enacted later in 1996 and effectively superseded Section 440(d) of AEDPA. See Pet. i, 8, 17-19; see also Pet. App. 6a (noting petitioner's attempt to distinguish Ninth Circuit precedent "because it arose in the context of IIRIRA, not AEDPA"). Therefore, the question that petitioner raises implicates only the limited universe of cases in which there is a dispute

about whether, for purposes of applying AEDPA Section 440(d), deportation proceedings were commenced before or after April 24, 1996.

Petitioner's assertion is that his deportation proceedings commenced for purposes of applying Section 440(d) when the INS served an order to show cause on him, not when his proceedings began in the immigration court upon the INS's filing of its charges. The universe of cases that could be affected by this Court's review of that issue includes only cases in which the INS served an order to show cause on the alien before April 24, 1996, but did not file charges with the immigration court until after that date. Although petitioner asserts that "[t]he issue has arisen repeatedly" in the past, Pet. 11, he cites only two other court of appeals decisions in which similar facts have been considered. See Pet. 8; *Asad*, 242 F.3d at 705 (Section 440(d) applicable because deportation proceedings commenced when charging document was filed with immigration court); *Wallace* v. *Reno*, 194 F.3d 279, 287 (1st Cir. 1999) (deportation process "effectively beg[a]n" before AEDPA, when order to show cause was served on alien); see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307-1311 (11th Cir. 2000) (addressing applicability of AEDPA, although charges were filed with immigration court after IIRIRA's effective date). Petitioner does not suggest or demonstrate that a significant number of cases involving the application of AEDPA Section 440(d) to this distinctive factual scenario remains to be adjudicated at this point, more than seven years after AEDPA was enacted.

Finally, the Ninth Circuit's determination that AEDPA Section 440(d) applies to petitioner's case, despite the INS's service of an order to show cause prior to AEDPA, is correct. As the court of appeals ex-

plained (Pet. App. 5a), the question of when petitioner's deportation proceeding began is answered by the governing administrative regulations, which provided that "proceedings before an Immigration Judge commence[] when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. 3.14(a) (2002); see 8 C.F.R. 242.1(a) (1996) ("Every proceeding to determine the deportability of an alien in the United States * * * is commenced by the filing of an order to show cause with the Immigration Court."); 8 C.F.R. 240.55 ("an alien is considered to be in deportation proceedings only upon" the filing of the order to show cause with the immigration court). The BIA's determination that petitioner's deportation proceeding commenced when charging documents were filed with the immigration court, see Pet. App. 46a, is compelled by "the plain language" of the governing regulations, *Asad*, 242 U.S. at 705, and would in any event be entitled to judicial deference as a reasonable application of those regulations, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

The First Circuit determined in *Wallace* that "the deportation process has effectively begun" for purposes of AEDPA Section 440(d) when the order to show cause is served on the alien. 194 F.3d at 287. That determination, however, arose out of the First Circuit's concern about impermissible retroactive application of AEDPA, not an analysis of the governing administrative regulations. *Ibid.* As the First Circuit emphasized in a later case, its effective-date determination in *Wallace* was animated by constitutional concerns about AEDPA's retroactive application to aliens who entered guilty pleas before AEDPA—concerns that have since been fully addressed through the rule of *St. Cyr*. See *Costa* v. *INS*, 233 F.3d 31, 35-36 (2000). The consti-

tutional concerns that underlie *Wallace* no longer exist after *St. Cyr*, and *Wallace* accordingly provides no substantial support for petitioner's position in this case.

The Eleventh Circuit's decision in *Alanis-Bustamante* also does not create a significant conflict with the Ninth Circuit's decision in this case. The court emphasized in *Alanis-Bustamante* that the "case [was] about an order to show cause that was served on the alien but," unlike this case, "*never filed with the immigration court.*" 201 F.3d at 1309 n.13 (emphasis added). In addition, the Eleventh Circuit expressly did not decide in *Alanis-Bustamante* "whether service of the order to show cause alone is enough" to begin deportation proceedings. *Id.* at 1309. The Eleventh Circuit concluded only that the "combination of" the INS's service of an order to show cause (which was never filed), together with the INS's earlier lodging of a warrant of detainer, was "enough to commence proceedings for purposes of determining the applicable law." *Ibid.* The category of as-yet-unresolved cases presenting *that* particular factual scenario is even more limited than the category of cases in which an order to show cause was served before AEDPA's enactment but not filed until after that date. See p. 16, *supra*. Accordingly, an issue arising specifically out of that scenario during the short-lived transition to AEDPA Section 440(d) presents no issue of general or continuing importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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